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No._____

IN THE

Supreme Court of the United States

October Term, 1988

PG PUBLISHING COMPANY, t/a THE PITTSBURGH POST-GAZETTE, a corporation,
Petitioner,

vs.

RICHARD DISALLE and JOAN DISALLE, his wife,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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Questions Presented

A. Do the First and Fourteenth Amendments protect a newspaper from liability where it makes an accurate and disinterested report of statements about alleged misconduct by a public official regardless of the newspaper's subjective belief as to the truth or falsity of those allegations?

B. If so, under this privilege of "neutral reportage," is a newspaper's protection limited to cases where the person who originally made the allegations was himself or herself "a public official or a public figure already embroiled in a public controversy"?

C. Is a newspaper deprived of due process of law where a jury sitting in a defamation action is permitted to award a public official $2,000,000 in punitive damages, ten times the amount of compensatory damages awarded?*

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* A similar, but not identical, question is under advisement by this Court in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, No. 88-556, *cert. granted* Dec. 5, 1988.

List of Parties

The only parties to this proceeding are those listed in the caption. PG Publishing Company is a wholly owned subsidiary of Blade Communications, Inc. The other wholly owned subsidiaries of Blade Communications, Inc. are Monterey Pennsula Herald Co., Toledo Blade Company, Community Communication Service, Inc., Independence Television Company, Lima Communications Corp., WLFI-TV, Inc., Idaho Independent Television, Inc., LFI Productions, Inc., Buckeye Cablevision, Inc., Erie County Cablevision, Inc., and Monroe Cablevision, Inc.

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II. Opinions of the Courts Below

The Order of the Pennsylvania Supreme Court denying Petitioner's Petition for Allowance of Appeal, dated March 7, 1989, is unreported and is reproduced in the Appendix. A. 1a-2a. The Opinion and Order of the Superior Court of Pennsylvania, dated June 15, 1988, are reported at 375 Pa. Super. 510, 544 A.2d 1345 and are reproduced in the Appendix. A. 3a-83a. The Opinion and Order of the Court of Common Pleas of Washington County, Pennsylvania, dated December 12, 1986, denying Petitioner's motions for post-trial relief, are unreported and are reproduced in the Appendix. A. 84a-119a.

III. Jurisdictional Statement

The Order of the Supreme Court of Pennsylvania denying Petitioner's Petition for Allowance of Appeal is dated March 7, 1989.

This Honorable Court has jurisdiction by writ of certiorari pursuant to 28 U.S.C. §1257(3).

IV. Constitutional Provisions Involved

This case involves the following provisions of the Constitution of the United States:

Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Amendment XIV, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

V. Statement of the Case

PG Publishing Company, which publishes a daily morning newspaper known as the *Pittsburgh Post-Gazette,* seeks certiorari to review a judgment of the Pennsylvania Superior Court affirming an award totalling $2,210,000 in a defamation action brought against the Post-Gazette by respondents Richard DiSalle and Joan DiSalle. On March 7, 1989, the Supreme Court of Pennsylvania denied discretionary review of this judgment. A. 1a-2a.[1]

On September 10, 1979, the Post-Gazette published an article headlined "Feud Heats in Family's Battle for $8 Million Inheritance." The article, which is reproduced in its entirety at A. 74a-80a, described a lengthy and bitter dispute over the authenticity of a will allegedly executed by one Paul Ciaffoni, who had died in 1974 leaving a sizeable estate. The dispute, which manifested itself most visibly in litigation in the Court of Common Pleas of Washington County, pitted Paul Ciaffoni's widow, two of his sons, one of his daughters, and various grandchildren against four other daughters of Paul Ciaffoni and various other grandchildren. The central charge in this feud, a charge made most vocally and persistently by Robert Ciaffoni on behalf of his mother and the other contestants, was that the will presented for probate was falsified.

Respondent Richard DiSalle was the local attorney who drafted the disputed will in 1968. By the time the newspaper article was being researched and published by the Post-Gazette, DiSalle had served for eight years on the Court of Common Pleas of Washington County, had been appointed by Governor Milton Shapp to fill a vacancy on the Commonwealth Court of Pennsylvania,

[1] References are to the Appendix included herewith.

and was campaigning for election to a full term on that latter court. A. 7a, 9a.

As ultimately published, the article attributed various allegations to Robert Ciaffoni, including his charge that "the will was falsified to the benefit of his youngest sister, Elizabeth Cowden[.]" The article went on to report that Ciaffoni "names as co-conspirators her and Commonwealth Court Judge Richard DiSalle who prepared the will in 1968 as an attorney." A. 75a.

Another portion of the article included Robert Ciaffoni's assessment of the relationship between Cowden and DiSalle:

> He said that when DiSalle prepared the will DiSalle and Elizabeth were close friends.
>
> In a deposition prepared by Richard Sprague, attorney for proponents of the will, and entered in the court of record of the case, Sprague questioned Robert about the relationship between DiSalle and his sister Elizabeth.
>
> Sprague asked Robert in the deposition:
>
> > "Now you tell me what has been told to you by other people which to you is an indication of sexual intimacy between Richard DiSalle and Elizabeth Cowden?"
>
> Robert replied:
>
> > "I'm sorry, you're misstating my position. I said they were by themselves for extended periods of time and were observed by other people and that it could develop into that. That's all I am telling you."

A. 78a. The article quoted DiSalle as declining to comment on the charges because "the case is under appeal." A. 79a.

Shortly after the article appeared, DiSalle and his wife initiated a defamation action against the Post-Gazette in the Court of Common Pleas of Washington County. In material part, DiSalle alleged that the article had defamed him by disseminating Robert Ciaffoni's charge that he had participated in a fraudulent act and by implying that he had been involved in an extra-marital relationship with Elizabeth Cowden.

At trial in April 1985, the Post-Gazette did not attempt to establish that the newspaper had any opinion at all about the truth or falsity of the charges made by Robert Ciaffoni. Instead, it argued that, because the charges were newsworthy and because DiSalle was a public figure, it was constitutionally privileged to report them accurately and disinterestedly. The trial court refused, however, to instruct the jury in such a fashion and instead instructed it, under *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), that the Post-Gazette could be found liable for defamation if it knew the allegations were false or published them "with reckless disregard of whether they were false or true." A. 92a-99a.[2] The court further instructed the jury that punitive damages could be awarded if it found "by clear and convincing evidence" that the Post-Gazette acted "with a bad motive or . . . with reckless indifference for the interest of others." A. 111a-112a.

In regard to punitive damages, the trial court rejected a proffered instruction that the award of damages "must . . . not . . . go beyond fair compensation for the actual

[2] At the Post-Gazette's request, the trial court did instruct the jury that the newspaper had, under the common law, a conditional privilege of "fair comment" to publish a "fair and substantially accurate" summary of judicial proceedings. A. 104a-105a. This privilege differs in a number of significant respects, however, from the privilege of neutral reportage also sought by the Post-Gazette.

injury caused to the plaintiffs, since to do so would pose a threat to the legitimate interest of freedom of speech and of the press which are protected by the Constitution." A. 62a-63a. Instead, the jury was instructed:

> The amount you assess as punitive damages need not bear any relation to the amount you choose to award as compensatory damages. . . . The sole purpose of punitive damages and the only purpose for which you may make an award and set an award of punitive damages is to punish the Defendant's outrageous conduct and to deter the Defendant and others from the commission of similar acts.

A. 111a-112a.

The Post-Gazette also asserted, unsuccessfully, that punitive damages should be allowed, if at all, in a defamation case brought by a public official only when the evidence showed actual knowledge of falsity and intent to harm. The trial court permitted such an award upon a finding of "actual malice." A. 44a.

The jury ultimately returned a verdict for plaintiffs, awarding Richard DiSalle $200,000 in compensatory damages and $2,000,000 in punitive damages, and awarding Joan DiSalle $10,000 in compensatory damages for loss of consortium. This award was later sustained by the trial court over the Post-Gazette's motions for post-trial relief.

On appeal, the Superior Court of Pennsylvania affirmed. Near the outset of its analysis it noted that "Judge DiSalle, at the time the Post-Gazette article was published, was the holder of a position in the public trust and a candidate to continue in that role." A. 11a. It therefore concluded that he "was a public official at the time the article was published and that the offending

expressions contained thereon [*sic*] related to official conduct." In this latter regard, the Superior Court relied on this Court's decision in *Ocala Star-Banner Co. v. Darmon*, 401 U.S. 295, 300 (1971) ("a charge of criminal conduct against an official or candidate, no matter how remote in time or place, is always relevant to his fitness for office.") A. 11a.

Turning to the vitality of the Post-Gazette's primary line of defense, the Superior Court observed that there were no Pennsylvania decisions "discussing the existence of a constitutional privilege of neutral reportage which would protect from liability a media defendant which reports defamatory statements made against public figures, regardless of the republisher's subjective awareness of the truth or falsity of the accusations." A. 26a. It found no dearth of discussion on this point in other jurisdictions, however, and, after developing at great length the various trends, countertrends, arguments, and rebuttals on this point, ultimately offered its own, unique formulation of the privilege and its application to this case:

> [W]e hold that if neutral reportage is to be recognized as a constitutional privilege, it can offer protection irrespective of the publisher's belief in the truth or falsity of the charges only when a public official or a public figure already embroiled in a public controversy levels a false charge against a public official or figure.
>
> * * *
>
> [Here,] Robert Ciaffoni . . . is not and does not claim to be either a public official or a public figure, and the bitter dispute over the validity of Paul Ciaffoni's will, while perhaps of some interest to the public, is not the type of controversy about which the public needs to be informed to better exercise the right of self-government. Therefore, the question of a

> constitutional privilege of neutral reporting must remain open in this jurisdiction until the court is presented with a proper case. We hold that the trial court did not err in its application of the *New York Times* actual malice standard, nor did it err in instructing the jury on that standard.

A. 40a-41a.

On the issue of the constitutionality of punitive damages, the Superior Court divided 2-1. The majority asserted that "The United States Supreme Court, to date, has not asserted any constitutional constraints on the awarding of punitive damages to a public official in a defamation action," and declined to offer any protection beyond the showing of actual malice required, in private figure cases, by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). A. 45a. Judge Montgomery, in dissent, referred to Justice O'Connor's concurring opinion in *Bankers Life and Casualty Co. v. Crenshaw*, _____ U.S. _____, 108 S.Ct. 1645, 1654 (1988), and expressed his own concern regarding "a denial of due process in a punitive damage procedure such as that followed in the courts of our Commonwealth, in which there are no real limits or structure." *Id.* In his opinion "bifurcation of the compensatory and punitive damages stages of a case" would be "one essential requirement to avoid offending due process." A. 82a.

On March 7, 1989, the Pennsylvania Supreme Court denied discretionary review.[3]

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[3] The Post-Gazette raised the issues of the existence and scope of the neutral reportage privilege with the trial court through proposed points for charge, which the court rejected, A. 98a-99a, and through motions for post-trial relief, which the court denied. A. 98a-99a. The issues were presented to the Pennsylvania Superior Court, which addressed the questions at length in its Opinion,

(Footnote continued on following page.)

VI. Reasons for Allowance of the Writ

Since this Court's decision in *Time, Inc. v. Pape,* 401 U.S. 279 (1971), lower courts across the nation have struggled with and disagreed over the privilege of neutral reportage. No better example of the reigning confusion can be found than the long, convoluted effort by the court below to come to terms with the issue, an effort that ultimately generated a privilege unique in its definition and positively quirky in its application. It is time for this Court to resolve this important dispute.

In addition, this case raises the constitutionality of punitive damages in a public figure defamation case. This Court already has under advisement *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.,* No. 88-556, which questions the constitutionality of such damages even in the absence of the additional protection afforded by the First Amendment. At a minimum, the judgment below will have to be reexamined in light of this Court's ruling in *Browning-Ferris.*

(Footnote continued from preceding page.)

reserving a conclusive decision on the validity of the privilege because, under the court's singular view of the scope of the privilege, it would not apply in the instant case. A. 39a-42a. The Post-Gazette presented the issues to the Pennsylvania Supreme Court, which denied the Post-Gazette's Petition for Allowance of Appeal. A. 1a.

The Post-Gazette challenged the constitutionality of the punitive damages award in the trial court through proposed points for charge, which the court rejected, A. 63a, and through motions for post-trial relief, which the court denied. A. 111a-112a. The issue was also presented to and addressed by the Superior Court, which affirmed the punitive damages award A. 68a-70a. The Post-Gazette included the punitive damages issue in its Petition for Alowance of Appeal, which the Pennsylvania Supreme Court denied.

A. The existence of a constitutional privilege of neutral reportage is an issue of great importance over which appellate courts, both state and federal, are in tumultuous conflict.

The herald, if perhaps not the creator, of the privilege of neutral reportage was this Court's decision in *Time, Inc. v. Pape,* 401 U.S. 279 (1971). There, Frank Pape (of *Monroe v. Pape* fame)[4] brought a defamation action against Time Magazine for reporting on allegations about Pape's conduct included in "Justice," a report issued by the United States Commission on Civil Rights. In wording this Court found "extravagantly ambiguous," the Civil Rights Commission had either charged Pape with a gross breach of Mr. and Mrs. Monroe's constitutional rights or had itself merely republished the allegations made by the Monroes in their own civil action. In reporting on "Justice," Time arguably implied that Pape had, in fact, committed the violations.

The district court had directed a verdict for Time. The court of appeals reversed, however, holding that "it was for the jury to determine whether Time's omission of the word 'alleged' showed 'actual malice.' " 401 U.S. at 288.

In reversing the court of appeals, this Court noted that the reasoning employed by the court of appeals was ill-suited to situations where a defendant was being sued for reporting on someone else's charges about a public official:

> Analysis of this kind may be adequate when the alleged libel purports to be an eyewitness or other direct account of events that speak for themselves. . . . But a vast amount of what is published in the daily and periodical press purports to be descriptive of what somebody *said* rather than of what anybody *did.* Indeed, perhaps the largest share of news

[4] 365 U.S. 167 (1961).

> concerning the doings of government appears in the form of accounts of reports, speeches, press conferences, and the like. The question of the 'truth' of such an indirect newspaper report presents rather complicated problems.

401 U.S. at 285-86 (emphasis in original).

Ultimately, the Court resolved those "complicated problems" by refusing to fix liability on Time for its "indirect newspaper report":

> In light of the totality of what was said in Justice, we cannot agree that when Time failed to state that the Commission in reporting the Monroe incident had technically confined itself to the allegations of a complaint, Time engaged in a 'falsification' sufficient in itself to sustain a jury finding of 'actual malice.'

401 U.S. at 289.

Since 1971 a number of lower courts, looking primarily to *Time, Inc. v. Pape,* have recognized a constitutional privilege now commonly known as "neutral reportage." One of the first was the United States Court of Appeals for the Second Circuit.[5] In *Edwards v. National Audubon Society, Inc.,* 556 F.2d 113 (2d Cir.), *cert. denied,* 434 U.S. 1002 (1977), that court considered the republication of charges made by the National Audubon Society, a "responsible, prominent organization," and reasoned:

> What is newsworthy about such accusations is that they were made. We do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth. Nor must the press take up cudgels against dubious charges in order to publish them without fear of liability for

[5] An earlier case, *Medina v. Time, Inc.,* 439 F.2d 1129 (1st Cir. 1971), is frequently cited as a precursor of the privilege of neutral reportage.

> defamation. . . . The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them.

Accordingly, the "accurate and disinterested reporting of those charges" was privileged "regardless of the reporter's private views regarding their validity." *Id.* at 120. *See also Law Firm of Daniel P. Foster, P.C. v. Turner Broadcasting System, Inc.*, 844 F.2d 955 (2d Cir.), *cert. denied*, _____ U.S. _____, 109 S.Ct. 559 (1988) (recognizing vitality of privilege but not reaching its applicability); *Cianci v. New Times Publishing Co.*, 639 F.2d 54 (2d Cir. 1980) (considering privilege but concluding it did not apply).

Numerous other jurisdictions have joined the Second Circuit in recognizing a privilege of neutral reportage even while disagreeing somewhat over its precise contours. *See Wilson v. Birmingham Post Co.*, 482 So.2d 1209 (Ala. 1986); *Godbehere v. Phoenix Newspapers, Inc.*, 15 Media L. Rep. 2050 (Ariz. Super. 1988); *Weingarten v. Block*, 102 Cal. App.3d 129, 162 Cal. Rptr. 701, *cert. denied*, 449 U.S. 899 (1980); *El Amin v. Miami Herald Publishing Co.*, 9 Media L. Rep. 1079 (Fla. Cir. Ct. 1982); *Krauss v. Champaign News Gazette, Inc.*, 375 N.E.2d 1362 (Ill. App. 1978); *April v. Reflector-Herald, Inc.*, 15 Media L. Rep. 2455 (Ohio App. 1988) (unpublished opinion); *Palmer v. Seminole Producer, Inc.*, 9 Media L. Rep. 2151 (Ok. App. 1982) (unpublished opinion). *See also Connaughton v. Harte Hanks Communications, Inc.*, 842 F.2d 825, 847 (6th Cir.) (acknowledging privilege but finding it inapplicable because report "was neither accurate nor disinterested"), *cert. granted on other issues*, _____

U.S. _____, 109 S.Ct. 257 (1988)[*]; *Nader v. deToledano*, 408 A.2d 31, 53 (D.C. App. 1979), *cert. denied*, 444 U.S. 1078 (1980) (recognizing privilege but concluding report not protected). *Cf. Medina v. Time, Inc.*, 439 F.2d 1129 (1st Cir. 1971) (a pre-*Edwards* decision arguably recognizing privilege analogous to neutral reportage).

Other courts have simply rejected *Edwards'* reasoning and, with it, any privilege of neutral reportage. *See Dickey v. CBS, Inc.*, 583 F.2d 1221, 1225 (3d Cir. 1978) ("[W]e reject appellee's invitation to adopt *Edwards* . . . as the rule of this Court."); *Newell v. Field Enterprises, Inc.*, 415 N.E.2d 434, 452 (Ill. App. 1980) ("We . . . decline defendant's invitation to adopt the constitutional privilege recognized in [*Krauss v. Champaign News Gazette, Inc., supra*]); *McCall v. Courier-Journal and Louisville Times, Co.*, 623 S.W.2d 882, 887 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982) ("We reject the doctrine [of natural reportage]."); *Postill v. Booth Newspapers, Inc.*, 325 N.W.2d 511, 518 (Mich. App. 1982) ("We decline to embrace *Edwards*."); *Hogan v. Herald Co.*, 84 A.D.2d 470, 446 N.Y.S.2d 836, 842, *aff'd for the reasons stated by lower court*, 58 N.Y.2d 630, 458 N.Y.S.2d 538, 444

[*] The issues upon which this Court has granted certiorari in that case are:

> (1) In defamation action instituted by candidate for public office, do First and Fourteenth Amendments obligate appellate court to conduct independent review of entire factual basis for jury's finding of actual malice—review that examines both subsidiary facts underlying jury's finding of actual malice and jury's ultimate finding of actual malice itself?
>
> (2) Do First and Fourteenth Amendments prohibit judgment of liability in determination action instituted by candidate for public office, based upon finding that defendant engaged in highly unreasonable conduct constituting extreme departure from ordinary standards of investigation and reporting?

N.E.2d 1002 (1982) ("[I]n our view it is not possible to reconcile [the privilege of neutral reportage] with . . . *Gertz* [*v. Robert Welch, Inc.*, 481 U.S. 323 (1974)]."); *Janklow v. Viking Press*, 378 N.W.2d 875, 881 (S.D. 1985) ("We . . . decline to adopt the privilege of neutral reportage in South Dakota.").

Like the courts across the country, the commentators are split in their enthusiasm for, and formulation of, a privilege of neutral reportage. *Compare* Sowle, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report*, 54 N.Y.U. L. Rev. 469 (1979); Note, *The Developing Privilege of Neutral Reportage*, 69 Va. L. Rev. 853 (1983); Comment, *Restricting the First Amendment Right to Republish Defamatory Statements*, 69 Geo. L.J. 1495 (1981); Note, *Protecting the Public Debate: A Proposed Constitutional Privilege of Accurate Republication*, 58 Tex. L. Rev. 623 (1980); Note *Edwards v. National Audubon Society, Inc.: The Right to Print Known Falsehoods*, 1979 U. Ill. L. F. 943; Comment, *Constitutional Privilege to Republish Defamation*, 77 Colum. L. Rev. 1266 (1977) (all endorsing some form of privilege of neutral reportage), *with* Comment: *Edwards v. National Audubon Society, Inc.: A Constitutional Privilege to Republish Defamation Should be Rejected*, 33 Hastings L.J. 1203 (1982).

The importance of this issue, and the consequences of confusion, can hardly be overstated. As this Court noted in *Time, Inc. v. Pape, supra*, at 285, "a vast amount of what is published in the daily and periodical press purports to be descriptive of what somebody *said* rather than of what anybody *did*." Reporters, editors, and publishers need to know with some certainty when they may publish a newsworthy allegation relating to the

official conduct of a public official. Imagine the present dilemma of an editor in New York, where the United States Court of Appeals for the Second Circuit has recognized the privilege while the New York Court of Appeals has rejected it,[7] or in Illinois, where the intermediate appellate courts are in open disagreement on the issue.[8]

Clearly, debate over the privilege of neutral reportage has ripened into an important, mature conflict of judicial authority, a conflict worthy of this Court's immediate attention.

B. The unique formulation of the privilege by the court below is, itself, an issue meriting review.

If the debate over neutral reportage were simply two dimensional, the Superior Court in this case could have briefly summed up the arguments on each side and chosen to recognize the privilege or reject it. Instead, as the Superior Court's extended and multi-dimensional analysis confirms, the debate has over time grown exceedingly complex. This complexity arises, in large part, from disagreements over the precise scope of any privilege, and more particularly over the importance to the privilege that the original source of the charges be, in the words of *Edwards*, "a responsible, prominent organization like the National Audubon Society." 556 F.2d at 120.

The Pennsylvania Superior Court, like others before it, was extremely troubled by this apparent focus "on the prominence and reliability of the original defamer to

[7] *Compare Edwards v. National Audubon Society, Inc., supra,* with *Hogan v. Herald Co., supra.*

[8] *Compare Krauss v. Champaign News Gazette, Inc., supra, with Newell v. Field Enterprises, Inc., supra.*

determine whether the protections of neutral reportage should apply." A. 37a. According to the court below:

> The mere fact that a speaker is known to be reliable is not sufficient to entitle that person's words to constitutional protection irrespective of the reporter's knowledge that the statement is false. In fact, because neutral reportage intends to protect the publication of statements known to be false, the purported reliability of the source is totally irrelevant. Conversely, the unreliability of a speaker should not automatically disqualify his words from protection.

A. 38a. *See also Barry v. Time, Inc.*, 584 F. Supp. 1110, 1126 (N.D. Cal. 1984); Comment, *supra*, 77 Colum. L. Rev. at 1277; Note, *supra*, 69 Va. L. Rev. at 872 ("[A]pplying the privilege only where the original defamer is 'prominent' works to disadvantage unfairly victims of defamation whose attackers happen to be powerful and established.").

Having thus rejected the importance of the prominence or credibility of the originator of the charges, the Superior Court could quite reasonably have followed the lead of those courts that key the availability of protection on the public status of the plaintiff and the "newsworthiness" of the charges, *i.e.*, the relationship between the charges and a matter of public concern or controversy. *See, e.g., Barry v. Time, Inc., supra; Weingarten v. Block, supra; El Amin v. Miami Herald Publishing Co., supra; Krauss v. Champaign News Gazette, Inc., supra. See also* Sowle, *supra*, 54 N.Y.U. L. Rev. at 528-32; Comment, *supra*, 69 Geo. L.J. at 1503, 1507.

Instead, the Pennsylvania Superior Court cut the baby in half, defining an unprecedentedly narrow privilege of neutral reportage and then holding that the Post-Gazette

had not met that standard. According to the Superior Court, the privilege can only arise "when a public official or public figure already embroiled in a public controversy levels a false charge against a public official or figure." A. 40a. Here, the Superior Court conceded that DiSalle was a public official (A. 9a) and that the charges related to his "official conduct" and were of "public concern" A. 11a, 46a. It nevertheless held that the Post-Gazette could not invoke the privilege because "[t]he party making the charge, Robert Ciaffoni, is not and does not claim to be either a public official or a public figure, and the bitter dispute over the validity of Paul Ciaffoni's will, while perhaps of some interest to the public, is not the type of controversy about which the public needs to be informed to better exercise the right of self-government." A. 41a.

If the Superior Court's application of these standards is any indication, it is easy to see why no other court in any jurisdiction has corralled the privilege in this fashion. It is difficult, indeed impossible, to understand how Robert Ciaffoni, who made very grave and very public accusations about a judicial officer and candidate for election to public office, could be anything *but* a public figure. *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 351 (1974) (A public figure is one who has "thrust [himself] to the forefront of particular public controversies in order to influence the resolution of the issues involved" or "an individual [who] voluntarily injects himself ... into a particular public controversy[.]").

It is similarly difficult to understand how charges that relate to "official conduct" by a "public official" and are of "public concern" are not "the type of controversy about which the public needs to be informed to better

exercise the right of self government." On the contrary, Ciaffoni's charges, if true, were precisely the type of information the public must have to insure the integrity of its elected and appointed officials.

Clearly, the limits placed upon the privilege of neutral reportage by the Pennsylvania Superior Court are unfounded and pernicious, both in their formulation and their application. Review should be granted.

C. The award of punitive damages in this case violated the First, Eighth, and Fourteenth Amendments.

The trial court in this case refused to give several proposed instructions cautioning the jury, on constitutional grounds, not to award "excessive" punitive damages and attempting to set the "actual injury established by the evidence" as a limitation on the amount of damages. A. 43a-44a. The Post-Gazette also argued below that punitive damages should only be allowed in a defamation case involving a public official when the evidence showed actual knowledge of falsity and intent to harm. A. 44a.

The trial court instead instructed the jury that it could award punitive damages upon a finding of "actual malice" under *New York Times v. Sullivan, supra*, and that the amount of the award need bear no relationship at all to the amount of compensatory damages awarded.[9] A. 110a-112a. Ultimately, the jury awarded Richard DiSalle $200,000 in compensatory damages and

[9] In this latter regard, the Supreme Court of Pennsylvania has recently reaffirmed its position that a "requirement of proportionality" between compensatory and punitive damages would defeat the purpose of punitive damages, *i.e.*, "to punish a tortfeasor for outrageous conduct and to deter him or others from similar conduct." *Kirkbride v. Lisbon Contractors, Inc.*, No. 130 E.D. 1987, slip op. at 7 (March 3, 1989).

$2,000,000 in punitive damages. The Superior Court affirmed this result over Judge Montgomery's dissent that the size of the award and procedure that generated it violated due process of law. A. 3a-83a.

This Court currently has under advisement the case of *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, No. 88-556, *cert. granted* Dec. 5, 1988, 57 U.S.L.W. 3390, a case arising out of the federal court system and raising the question whether "an award of $6 million in punitive damages, amounting to more than 100 times plaintiffs' actual damages from purely economic tort, is excessive under the Eighth Amendment or otherwise[.]" Long before the arrival of *Browning-Ferris*, however, this Court expressed its concern that punitive damages posed special constitutional hazards in defamation cases. In *Gertz v. Robert Welch, Inc., supra*, an action brought by a "private figure" as opposed to a public official or public figure, the Court wrote:

> In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence. In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.

418 U.S. at 350.

This Court's ultimate decision in *Browning-Ferris* will, of course, have a great impact upon its analysis of this petition. Although the challenge in *Browning-Ferris* was made primarily under the Eighth Amendment's proscription of "cruel and unusual punishment," it is hard to imagine that the protections afforded a media defendant by the First Amendment could be any less extensive, especially in light of *Gertz*. In any event this case arises out of the state, as opposed to the federal courts, so both the First Amendment and the Eighth Amendment are subsumed within, and incorporated as to the states by, the due process clause of the Fourteenth Amendment. *See Near v. Minnesota*, 283 U.S. 697, 707 (1931); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947) (plurality opinion). Their protections are therefore merged into a single constitutional concept.

Should this Court sustain the constitutional challenge raised in *Browning-Ferris*, it will want at a minimum to grant this petition, vacate the judgment below, and remand for further consideration. Should this Court reject the challenge raised in that case under the Eighth Amendment, it nevertheless should grant this petition to consider the slightly different question whether the First Amendment provides, as suggested in *Gertz*, additional protection against punitive damages, and in particular whether such damages are precluded or otherwise limited in cases brought by public officials or public figures.

VII. CONCLUSION

This petition for a writ of certiorari should be granted.

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* *Counsel of Record*

APPENDIX

Order of the Supreme Court of Pennsylvania Dated March 7, 1989

(Seal)

The Supreme Court of Pennsylvania
Western District

Prothonotary
IRMA T. GARDNER
Deputy Prothonotary

801 City-County Building
Pittsburgh, Pa.
15219
(412) 565-2816

March 10, 1989

Frederick N. Egler, Esquire
EGLER, ANSTANDIG & GARRETT
2100 Lawyers Building
Pittsburgh, PA 15219

In Re: Richard DiSalle and Joan DiSalle, his wife v. PG Publishing Company, t/a The Pittsburgh Post-Gazette, a corporation No. 475 W.D. Allocatur Docket 1988

Dear Mr. Egler:

The Court has entered the following Order on your Petition for Allowance of Appeal in the above-captioned matter:

> "March 7, 1989
> PER CURIAM:
> Petition denied.
> Mr. Justice Larsen, Mr. Justice McDermott and Mr. Justice Papadakos did not participate in the consideration or decision of this matter."

Very truly yours,

IRMA T. GARDNER
Irma T. Gardner
Deputy Prothonotary

ITG/dad
cc: Daniel M. Berger, Esq.
Honorable Thomas D. Gladden
President Judge

Order and Opinion of the Superior Court of Pennsylvania Dated June 15, 1988

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

No. 80 Pittsburgh, 1987

RICHARD DiSALLE and JOAN DiSALLE,
His Wife,

v.

P.G. PUBLISHING COMPANY, t/a
THE PITTSBURGH POST-GAZETTE,
a Corporation.

ORDER

AND NOW, this 15th day of June, 1988, it is ordered as follows:

X	Order affirmed.
_____	Order reversed.
_____	Judgment affirmed.
_____	Judgment of Sentence affirmed.
_____	Judgment of Sentence reversed.
_____	Order vacated and lower court directed to proceed in accordance with opinion filed herewith.
_____	Order modified as set forth in opinion filed herewith.

_____ Costs to be taxed as provided by Chapter 27 of the Pa.R.A.P.

_____ Costs to be taxed as provided in opinion filed herewith.

_____ Appeal quashed.

BY THE COURT

ELEANOR R. VALECKO
Deputy Prothonotary

IN THE SUPERIOR COURT
OF PENNSYLVANIA

No. 80 Pittsburgh 1987

RICHARD DiSALLE and JOAN DiSALLE,
His Wife,

v.

P.G. PUBLISHING COMPANY, t/a
THE PITTSBURGH POST-GAZETTE,
a Corporation,

Appellant.

BEFORE: CIRILLO, *P.J.*, and JOHNSON and MONTGOMERY, *JJ.*

OPINION BY CIRILLO, President Judge: Filed: June, 15, 1988

The libel action underlying this appeal stems from the publication of an article in the September 10, 1979 edition of the appellant's newspaper, the Pittsburgh Post-Gazette. *See* Appendix. The suit was tried by the Court of Common Pleas of Washington County sitting by agreement of the parties and counsel in neighboring Westmoreland County. The Honorable Gilfert M. Mihalich, President Judge of Westmoreland County,

presided by special appointment. Following a lengthy trial, the jury returned a general verdict in favor of the appellees, Richard DiSalle and Joan DiSalle, his wife, in the combined amount of $210,000.00 compensatory and $2,000,000.00 punitive damages. The Post-Gazette filed timely motions for post-trial relief, which the trial court denied after a thorough and well reasoned discussion of the case. Here the paper seeks, in the alternative, a judgment *non obstante veredicto,* a new trial, or a remittitur of damages.

The appellant urges upon us three categories of error committed by the trial court which entitle it to the relief sought: (1) error concerning the constitutional "actual malice" standard to be applied; (2) error concerning the award of compensatory damages; and (3) error concerning the award of punitive damages.[1] We affirm.

The article in question appeared in the "City/Area" section of the Post-Gazette, a paper with a daily readership of nearly 200,000, under the title "Feud Heats in Family's Battle for $8 Million Inheritance." The

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[1] The appellant's Statement of the Questions Involved frames the issues as follows:

I. Whether the trial court erred in failing to grant judgment notwithstanding the verdict under the constitutional "actual malice" standard enunciated in *Time, Inc. v. Pape*?

II. Whether the trial court erred in failing to instruct the jury on the "actual malice" issue under the *Time, Inc. v. Pape* standard?

III. Whether the trial court erred in permitting the jury to assess damages for present and future harm?

IV. Whether the trial court erred in permitting the jury to assess punitive damages?

V. Whether the trial court erred in failing to instruct the jury as to limitations on the punitive damage award required under Pennsylvania Law and the First Amendment?

VI. Whether the trial court erred in failing to set aside the punitive damage verdict?

matter was first brought to the attention of the Post-Gazette staff when Robert Ciaffoni called the assistant city editor, Dave Warner, to inform him of a dispute then embroiling his family over the will of his father, Paul Ciaffoni, who had died in 1974. Mr. Warner assigned a reporter, Tom Porter, to investigate the potential for a story.

Mr. Porter's first stop, and ultimately his principal source of information in this investigation, was Robert Ciaffoni. From Ciaffoni, Porter learned that the family dispute focused on the authenticity of the decedent's 1968 will, which had been admitted to probate in 1974. He also learned that Ciaffoni, as well as other family members, had taken the contest to the courts of Washington County by filing an appeal from probate, that the matter had been tried before the Honorable Earl S. Keim, specially appointed to preside over the contest, and that Judge Keim had upheld the validity of the probated document six months before Ciaffoni contacted the newspaper, and nearly a year before the article was published.

In this context, Richard DiSalle, a local attorney who has served for eight years on the trial bench of Washington County, and who later filled a vacancy on the commonwealth court bench by appointment of Governor Shapp, was alleged to have conspired with Ciaffoni's sister, Elizabeth Cowden, to produce the fraudulent will. After reviewing an early draft of Porter's story, Warner noted what he considered to be a hole in that it did not give any explanation why DiSalle would involve himself in such a conspiracy. In an attempt to address this concern, Porter included in later drafts material from a deposition taken of Robert Ciaffoni in anticipation of the will contest, wherein Ciaffoni was

asked about prior statements he had made concerning the relationship btween DiSalle and Mrs. Cowden. In the final article, this material, by then reduced to a single quote, left the reader with the impression that the reason for DiSalle's involvement in the conspiracy was a meretricious relationship with Mrs. Cowden. This issue was never raised during the trial itself, nor was the deposition introduced into evidence.

These two allegations made by Robert Ciaffoni, that is, that Richard DiSalle participated in a fraudulent act and that he had an illicit affair with a co-conspirator, contained as they were in an article that did not principally focus on the will contest which had occurred in Washington County much earlier, form the basis of this libel action.

I

ACTUAL MALICE

The Post-Gazette first challenges the definition of actual malice applied by the trial court, asserting that a different standard should have been used under the facts of this case. Because the paper does not also allege that the evidence was insufficient to prove actual malice as the trial court defined it, we are faced with the single question whether the trial court committed an error of law in defining actual malice as it did. Before reaching this issue, however, we must first determine the propriety of applying the actual malice standard at all.

A. Applicability of Actual Malice

The requirement of proof of actual malice in certain defamation actions, discussed more extensively *infra*, was first introduced into the constitutional arena, where the tension between the freedoms of the First

Amendment and the constraints of state defamation law is manifest, by the Supreme Court in the landmark case of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). There, the Court cleared the ground and laid the cornerstone of this coliseum for the stated purpose of more effectively limiting "a state's power to award damages for libel in actions brought by *public officials* against critics of their *official conduct.*" *Id.* at 283 (emphasis added).

At the time the article in question was being researched and published, Richard DiSalle was sitting on the Commonwealth Court of Pennsylvania by appointment and was campaigning for a full term on that court. Thus, his status as a public official cannot be disputed. However, the alleged misconduct attributed to DiSalle occurred in the late 1960's, when he was a private attorney, and approximately ten years before his appointment to a vacancy on the Commonwealth Court. At first blush, then, it appears that only one of the two requirements of the *New York Times* standard has been met, and proof of actual malice should not have been required.

However, as is often the case, in the years which followed the Supreme Court's decision in *New York Times*, factual scenarios arose which tested the high court's statement of the rule. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), the Supreme Court reversed a Louisiana Supreme Court decision which refused to apply the *New York Times* rule in a prosecution for criminal defamation. The state court reasoned that the expressions at issue did not fall within the purview of criticism of official conduct when the attack was on the personal integrity of eight state trial judges and not on the way any one of them conducted his court when in session.

Justice Brennan, in his opinion for the court, found this reasoning defective:

> The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.

Garrison, 379 U.S. at 77 (footnote omitted).

In *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971), the Supreme Court was asked to revisit the question of what constitutes "official conduct" in determining when the *New York Times* rule is to be applied. There, the plaintiff in a civil libel action sought recovery for a statement made during the course of a political campaign that the candidate was a former small-time bootlegger. The trial court recognized that the plaintiff's candidacy for public office made him a public figure, but left it to the jury to determine whether the expression attacked official conduct rather than private conduct. The Supreme Court reversed, finding that the broadening of official conduct to that conduct which reflects on an official's fitness for office applies with special force to candidates. *Roy*, 401 U.S. at 274.

The court went on to note that,

> "[i]ndeed, whatever utility the "official conduct" concept may retain with regard to occupants of public office . . . it is clearly of little applicability in the context of an election campaign. The principal activity of a candidate in our political system, his "office", so to speak, consists in putting before the voters every conceivable aspect of his public and

> private life that he thinks may lead the electorate to gain a good impression of him. . . . And the candidate who vaunts his spotless record and sterling integrity cannot convincingly cry "Foul!" when an opponent or an industrious reporter attempts to demonstrate the contrary. Any test adequate to safeguard First Amendment guarantees in this area must go far beyond the customary meaning of the phrase "official conduct."

Id.

Judge DiSalle, at the time the Post-Gazette article was published, was the holder of a position in the public trust and a candidate to continue in that role. This factual situation was presented to the Supreme Court in *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971), decided on the same day as *Roy*. In reasserting the position taken in *Roy*, the court stated "that a charge of criminal conduct against an official or a candidate, no matter how remote in time or place, is always 'relevant to his fitness for office' for purposes of applying the *New York Times* rule of knowing falsehood or reckless disregard of the truth." *Ocala Star-Banner Co.*, 401 U.S. at 300.

Judge DiSalle's action in libel focused on two statements in the Post-Gazette article, the first asserting that he was a co-conspirator in fraud, and the second attributing his participation in that fraud to an illicit affair with his co-conspirator. Fraud, of course, is a crime and therefore falls squarely within the above-stated rule. Participation in a meretricious affair, while not strictly criminal, does, under the facts of this case, impute an improper motivation, and therefore is relevant to Judge DiSalle's fitness for office. Accordingly, we conclude that Richard DiSalle was a public official at the time the article was published and that the offending expressions contained thereon related to official conduct. *Cf.*

McLaughlin v. Philadelphia Newspapers, Inc., 465 Pa. 104, 348 A.2d 376 (1975) (press access to confidential records of a disciplinary proceeding brought against a private lawyer, now in public office, may be limited in spite of the public's interest in the qualifications of its servants; court distinguished the facts before it from cases like those relied upon here).

B. Actual Malice

It being clear that the DiSalles cannot recover in defamation absent clear and convincing evidence that the Post-Gazette's allegedly defamatory article was published with actual malice, we must now determine what that term means. At its genesis, the Supreme Court described the publication of material with actual malice as publication "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 279-280. As was true with the meaning of "official conduct" discussed above, the full definition of "actual malice" has awaited case-by-case development. Clearly the first part of the definition, that the information was published with "knowledge that it was false," does not present a difficulty, for one either knows or does not know that something is not true. It is the concept of reckless disregard which "cannot be fully encompassed in one infallible definition." *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968).

In *Garrison*, the Supreme Court equated reckless disregard with a "high degree of awareness of . . . probable falsity." *Garrison*, 379 U.S. at 74. Justice Harlan, in his plurality opinion in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), noted that "[i]nvestigating failures alone [have been] held insufficient to satisfy this standard." *Id.* at 153-154 (plurality opinion). The Court in *St. Amant, supra*, noted more expansively that

> reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant, 390 U.S. at 731.

It is clear, then, that in its development the establishment of actual malice has never strayed far from the question of falsity, and that, for a plaintiff to prevail under this standard, it must be shown that the defendant was certain of that falsity or came close to willfully blinding itself to it. As the Supreme Court noted in *Bose Corp. v. Consumers Union of United States,* 466 U.S. 485 (1984), "there is a significant difference between proof of actual malice and mere proof of falsity." *Id.* at 511 (footnote omitted). Recognizing that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' " *New York Times,* 376 U.S. at 271-272 (citation omitted), the Court promulgated the actual malice standard to define the proper accommodation between the law of defamation and the freedoms of speech and press.

The allocation of this burden to the plaintiff creates the "breathing space" needed to avoid self-censorship by greatly expanding the zone of protected speech. However, the fact that the Supreme Court created a "fault" standard instead of declaring any recovery for defamation unconstitutional "makes irresistible the inference that a significant portion of this speech is beyond the constitutional pale. This observation is almost tautologically true with regard to libels published

with 'actual malice.' " *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 783 (1986) (Stevens, J., dissenting) (footnote omitted).

Instantly, the trial court instructed the jury on the issue of actual malice in the following manner:

> Actual malice means that the Defendant newspaper knew that the defamatory statement was false when it published it or published the defamatory statements with reckless disregard of whether they were false or true. This means that the evidence must establish by clear and convincing evidence that the defamatory statement or that any defamatory statement was published with the knowledge that it was false or the entertainment of serious doubt as to the truth of the statement. Negligence, carelessness, bad judgment or inaccuracy in the preparation of the article is insufficient to prove actual malice. The mere failure to investigate does not establish reckless disregard, nor does mere negligence, negligent acts constitute actual malice. The reckless conduct which constitutes recklessness or a reckless disregard is not measured by whether a reasonable prudent man would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the Defendant, in fact, entertained serious doubt as to the truth of the publication. Publications with such doubt show reckless disregard to the truth or falsity, and this demonstrates actual malice.

R.R. at 1735a-1736a. This charge clearly states the rule as we have developed it above.

The charge continued:

> Actual malice has been interpreted as an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers. If you find from the evidence that the

> Defendant newspaper made such an extreme departure, then you may find in considering this evidence that it acted with actual malice.

R.R. at 1736a. This interpretation of actual malice was rendered in *Brophy v. Philadelphia Newspapers, Inc.*, 281 Pa. Super. 588, 596, 422 A.2d 625, 629 (1980) and relied upon Justice Harlan's plurality opinion in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967) (joined by three other justices). Chief Justice Warren, in a separate opinion, criticized the creation of a standard based on "highly unreasonable conduct" as being a departure from *New York Times* and too uncertain to aid in the effectuation of its purpose. *Curtis Publishing*, 388 U.S. 163 (Warren, C.J., concurring in the result). Given the virtual absence of subsequent cases applying this standard, its continued viability is suspect. However, we need not decide whether it was error to so instruct the jury because the appellant does not challenge this aspect of the court's charge.

C. Time, Inc. v. Pape

The Post-Gazette, however, urges that while this definition of actual malice is correct for the typical defamation case, it ignores certain salient facts in this case which should have put the trial court on a different path away from *New York Times* in search of the proper definition of actual malice to be applied. In support of this assertion the appellant relies heavily on *Time, Inc. v. Pape*, 401 U.S. 279 (1971).

Pape involved an article published in Time Magazine quoting parts of the then recently released fifth volume of the United States Commission on Civil Rights Report for 1961. This volume, entitled "Justice," focused on evidence of police brutality gathered by the Commission staff from around the country, and, as one item, noted a complaint filed by James Monroe, a citizen of Chicago,

against several police officers for violations under the Federal Civil Rights Acts. The Report went on to describe the substance of that complaint. Time, in reporting on the publication of "Justice," commented specifically on the section relating to Monroe and quoted extensively from the Report's summary of the allegations contained in Monroe's complaint. However, the article failed to indicate in any way that the charges being described were made by Monroe and were not the independent findings of the Commission. Detective Pape, one of the officers named in Monroe's complaint, sued Time for libel.

When trial was finally reached, and after all the evidence was in, the District Court granted Time's motion for a directed verdict. The Court of Appeals reversed, holding that it was a jury question whether Time's failure to attribute the charges against Pape to Monroe rather than the Commission showed actual malice. The Supreme Court reversed the Court of Appeals, holding that the directed verdict was properly entered. In supporting this result, the Court repeatedly emphasized that Time was not reporting on the historical events described in "Justice," but, instead, was reporting on "Justice" itself. Based on this distinction, the Court criticized the lower court's analysis of the question of malice[2] as the kind which "may be adequate

[2] According to the Supreme Court:

> The Court of Appeals concluded that it was obvious that the omission of the word "allegation" or some equivalent was a "falsification" of the Report. Since the omission was admittedly conscious and deliberate, the only remaining question in the court's view was whether there had been "malice" in the sense of an "intent to inflict harm through falsehood." Such an intent, the court thought, might reasonably be inferred from the very act of deliberate omission, and the issue of malice was consequently one for the jury.

Pape, 401 U.S. at 285.

when the alleged libel purports to be an eyewitness or other direct account of events that speak for themselves," *Pape,* 401 U.S. at 285, explaining that:

> A vast amount of what is published in the daily and periodical press purports to be descriptive of what somebody *said* rather than of what somebody *did.* Indeed, perhaps the largest share of news concerning the doings of government appears in the form of accounts of reports, speeches, press conferences, and the like. The question of the "truth" of such an indirect newspaper report presents rather complicated problems.

Id. at 285-286 (emphasis in original).

The Post-Gazette interprets this language to mean that the Supreme Court equates conventional libel cases with eyewitness or direct accounts, and that, in the case of indirect newspaper reports, the Constitution requires the application of a different actual malice standard. In stating this surrogate standard, the Post-Gazette notes that the *Pape* Court never considered Time's state of mind with respect to the truth or falsity of Monroe's allegations; rather the Court concerned itself with the magazine's understanding of the Commission Report. The Post-Gazette concludes that "[t]he Supreme Court made very clear that where the publication consists of an 'indirect newspaper report' of statements made by a third-party source, the publisher's knowledge of the truth or falsity of the actual facts is not an issue in the 'actual malice' determination." Brief for Appellant at 18.

The proper explanation for the *Pape* Court's focus on Time's understanding of the Commission's Report, rather than the substance of Monroe's allegations, is easily found in the nature of the case before it, and far removed from the creation of a hybrid definition of actual malice. Before discussing the law to be applied,

the Court noted that the case before it differed in a number of respects from the conventional libel case. The distinction relevant to the present discussion concerned the source of the alleged damage to reputation, the Court observing that it "was not that arising from mere publication, but rather that resulting from attribution of the Monroe accusations to an authoritative official source." *Pape,* 401 U.S. at 285. Thus, the Court failed to discuss Time's understanding of the truth or falsity of the Monroe accusations for the simple reason that that issue was not before it. The issue was whether Time had defamed Pape with actual malice when its article suggested that the United States Commission on Civil Rights was the party accusing him of the abuses contained in the Monroe complaint rather than Monroe, as the complainant, making allegations of abuse.[3]

It was in this context, then, that the Court explained its earlier statement concerning the difficulties of determining "truth" in indirect newspaper reports:

> In light of the totality of what was said in Justice, we cannot agree that when Time failed to state that the Commission in reporting the Monroe incident has technically confined itself to the allegations of a complaint, Time engaged in a "falsification" sufficient in itself to sustain a jury finding of "actual malice."
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> * * *
>
> Time's omission of the word "alleged" amounted to the adoption of one of a number of possible rationale interpretations of a document that bristled with ambiguities. The deliberate choice of such an

[3] That the Post-Gazette's interpretation of *Pape* did not incorporate this pivotal point is manifest in its brief, at page 21, where it asserts that "the *source* of defamatory allegations in *Time, Inc. v. Pape,* was not the Civil Rights Commission Report, but Monroe's complaint filed in the civil rights action." (emphasis in original).

> interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of "malice" under New York Times.

Id. at 289-290. Because Pape shaped his theory on appeal around the allegation that Time defamed him by reporting that the Civil Rights Commission was accusing him of civil rights violations,[4] it was Time's subjective awareness of the truth or falsity of this fact which was the focus of the Court's actual malice analysis. The Court found Time's interpretation, that "Justice" was making the accusation, rational in light of the document's ambiguities and concluded that the evidence was insufficient to establish publication with knowing or reckless disregard of the truth.

From this language, the Post-Gazette attempts to herald the birth of a new definition of actual malice incorporating the concept of rational interpretation into all indirect reporting cases, including the instant case, in lieu of the publisher's subjective awareness of probable falsity of the underlying facts. No such sweeping effect can be attributed to *Pape*. There, the defamation complained of was in the underlying facts and was unrelated to the report upon which the publication was

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[4] For a particularly thoughtful analysis of the effect of *New York Times*, decided while *Pape* was still in the lower courts, on the manner in which Detective Pape sought to assert his claim, see Sowle, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report*, 54 N.Y.U.L.Rev. 469, 502-508 (1979). According to Professor Sowle, the advent of the burden of proving actual malice caused Pape to abandon his allegation that Time defamed him by charging him with the civil rights abuses because proving that Time published with knowing or reckless inaccuracy promised to be a formidable task. By changing the theory to one of attribution of the charge to the Civil Rights Commission, Pape sought what apparently was perceived to be a lighter burden.

based. The Post-Gazette concedes that the defamation in the instant case concerned the statements that Richard DiSalle was a co-conspirator in a fraud and that he was involved in a meretricious affair. Nowhere is it contended that the defamatory injury stemmed from the newspaper's attribution of the accusations to Robert Ciaffoni or to any other source.

Even without the distinction between *Pape* and this case, however, we are not persuaded that the language of *Pape* redefines actual malice under its own facts. In *Dickey v. CBS, Inc.*, 583 F.2d 1221 (3rd Cir. 1973), the Third Circuit Court of Appeals was confronted with an argument similar to the one presented here. There, the appellant claimed that *Pape* stood for the proposition that cases "involving false statements by a third party which [have] been published by the press are entitled to a unique constitutional analysis." *Id.* at 1226. After reviewing the language from *Pape* which we considered above, the court concluded that "the Supreme Court's purpose in stating that Time was quoting from a third party appears to have been merely to emphasize the difficulty in accurately interpreting and communicating a third party's meaning without quoting a third party's statement in its entirety." *Id.* In the form of a more concise statement as to the effect of *Pape* on the jurisprudence of defamation and actual malice, the court in *McBride v. Merrell Dow & Pharmaceuticals, Inc.*, 800 F.2d 1208 (D.C. Cir. 1986) noted:

> That a statement *might* have been made without actual malice does not demonstrate that it was in fact so made. Ambiguity of a statement's subject matter may be probative evidence negating a finding of actual malice, *see Time, Inc. v. Pape*, 401 U.S. 279, 290, . . . but it does not call forth a conclusive presumption precluding resort to actual evidence of the defendant's state of mind.

Id. at 1212 (emphasis in original).

We agree. Surely if the Supreme Court in *Pape* had intended to announce a unique constitutional analysis for indirect reporting cases, it would have said so. Instead, it applied the definition of actual malice we stated above, and determined that, "[a]pplying *this standard* to Time's interpretation of the Commission Report, it can hardly be said that Time acted in reckless disregard of the truth." *Pape,* 401 U.S. at 292 (emphasis added); *see also Time, Inc. v. Firestone,* 424 U.S. 448, 459 n.4 (1976) ("Petitioner is incorrect in arguing that a rational interpretation of an ambiguous document is constitutionally protected under . . . *Pape* . . . There we were applying the New York Times standard . . . .").

D. Neutral Reportage

The real thrust of the protection sought by the Post-Gazette, therefore, is not contained in *Pape* for, as we have demonstrated, that decision does not stand for the proposition asserted[5] and is inapposite to the facts of the instant case. However, by also relying on the Court of Appeals for the Second Circuit's decision in *Edwards v. National Audubon Society,* 556 F.2d 113 (2nd Cir.) *cert. denied,* 434 U.S. 1002 (1977), the Post-Gazette provides us with a far more apposite, albeit not binding, *see Cianfrani v. Johns-Manville Corp.,* 334 Pa. Super. 1, 6, 482 A.2d 1949, 1051 (1984) (ruling of federal intermediate

[5] Although some early commentators made the same mistake as the Post-Gazette, *see, e.g.,* Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc., *and Beyond : An Analytical Primer,* 61 Va.L.Rev. 1349, 1362n.46 (1976) and *W. Prosser, Handbook of Law of Torts,* 832 and n.64a (4th ed. 1971), later analysts exposed the error. *See* Sowle, *Defamation and the First Amendment, supra* note 4, at 502.

appellate panel not binding on Pennsylvania courts), precedent for the claim that it is protected by a constitutional privilege of neutral reportage.[6]

In *Edwards,* the New York Times reported on a charge contained in the Foreword to the National Audubon Society's publication, "American Birds." There, the editor stated that scientists who claimed the use of the insecticide DDT was not adversely affecting the bird populations had been "paid to lie." A reporter for the Times procured the names of these scientists and published the story. The scientists sued for defamation.

The Court of Appeals for the Second Circuit, in reversing a judgment for the plaintiffs, reasoned that:

> [W]hen a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity. *See Time, Inc. v. Pape,* 401 U.S. 279, . . .; *Medina v. Time, Inc.,* 439 F.2d 1129 (1st Cir. 1971). What is newsworthy about such accusations is that they were made. We do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth.

Edwards, 556 F.2d at 120. In support of this rule, the court went on to point out that "[t]he public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them." *Id.*

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[6] "Neutral reportage" is the moniker assigned to the rule by the *Edwards* court, 556 F.2d at 120, and is the one we will use. It should be noted, however, that the rule has also been referred to as the privilege of accurate republication and the privilege of fair report.

In spite of its conclusion that the New York Times could not be held liable for defamation due to the protection afforded by its newly created constitutional privilege of neutral reportage, the court inexplicably went on to point out that, "absent the special protection afforded to neutral reportage, *see Time, Inc. v. Pape, supra*,[7] the evidence adduced at trial was [nonetheless] manifestly insufficient to demonstrate 'actual malice' on the part of the Times," *id.*, and to conclude that "even if the Times were required to assume direct responsibility for the accusations, it could not, consistent with *New York Times Co. v. Sullivan, supra*, be found liable for defamation." *Id.* at 121 (footnote omitted). Having so reasoned, the court undercut the importance of its new theory of neutral reportage by rendering it dictum.

However, the Post-Gazette has relied exclusively on this theoretical defense in its appeal and we, therefore, will give it further analysis. Having reached this point, we should note how the appellant's argument limits the issue before us. The *Edwards* expression of the neutral reportage rule essentially seeks to credential the common law privilege of fair report[8] with constitutional stature, with some telling differences not relevant here. The Post-Gazette has been careful to distance its argument from the common law privilege and does not challenge the trial court's charge on the common law rule of fair

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[7] As we have already pointed out, this reliance on *Pape* for the creation of the speical privilege is inappropriate.

[8] The Restatement (Second) of Torts §611 (1977) defines this privilege as follows:

> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported.

report,[9] nor does it challenge the jury's finding that the privilege had been abused. Therefore, we need not consider the issue of the common law privilege.

We also reassert that the Post-Gazette has not challenged the trial court's charge on actual malice as defined by *New York Times v. Sullivan, supra*, and its progeny, nor does it challenge the sufficiency of the evidence to support a finding of actual malice in this case. In fact, as will be developed *infra*, the need for the neutral reportage doctrine is manifest only in those circumstances where the defendant is not already protected by the constitutional requirement for proof of actual malice. Therefore, by relying solely on the neutral reportage doctrine, the Post-Gazette is implicitly admitting the existence of actual malice. The only error alleged is that the trial court failed to consider the neutral reportage doctrine in charging the jury and in

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[9] In footnote five of its brief, the Post-Gazette notes that the trial court charged the jury on the question of the common law privilege of fair report (the footnote refers to the common law rule as one of "fair comment", apparently relying on the trial judge's use of that term in his charge; however, "fair comment" refers to the privilege of free expression of opinion on matters of public concern, *see* Restatement (Second) of Torts §566 comment a (1977)—the correct name is "fair report"). Brief for Appellant at 28 n.5. It does not allege that the giving of this charge was error, or that the substance of the charge given was incorrect. Rather, it asserts "that the trial court may well have viewed the First Amendment protection afforded under *Time, Inc. v. Pape*, as roughly equivalent to the common law 'fair comment' privilege . . . [and therefore] that an instruction on *Time, Inc. v. Pape*, was unnecessary since the jury was charged on the common law privilege." *Id.*

The balance of the footnote attempts to demonstrate that the two privileges are different, most notably in the scope of the protections they respectively afford a libel defendant. We need not weigh the merits of the Post-Gazette's argued distinctions between the two privileges, however, because this issue has not been argued to us. We highlight the appellant's footnote for the sole purpose of demonstrating the limited nature of the liability issue on appeal.

deciding the motion for judgment n.o.v. Therefore, the availability of this doctrine to the Post-Gazette is the only remaining liability issue we will address.[10]

[10] In the course of its argument in favor of the neutral reportage privilege, however, the Post-Gazette makes brief reference to three related allegations of trial court error. First, it asserts that the trial judge compounded his error, in limiting his instruction to the traditional "knowledge of falsity or reckless disregard for truth" standard of actual malice by instructing on the common law "republication rule." As quoted in the Post-Gazette's brief, the court charged the jury as follows: " 'A newspaper that repeats or otherwise republishes false and defamatory matters is subject to liability as if it had originally published it . . . .' (R. 1735a)" Brief for Appellant at 29. By relegating the rest of the court's charge to an ellipsis, the Post-Gazette has taken the quote out of context and made it extremely misleading. Put into context, the entire sentence reads as follows:

> A newspaper that repeats or otherwise republishes false and defamatory matter is subject to liability as if it had originally published it, unless the publication is otherwise privileged, and I will explain the possible application of privilege later in my charge.

R.R. at 1735a. Clearly the trial court did not err in giving this charge.

Additionally, the Post-Gazette argues in footnote six of its brief that, because the source of the defamatory material contained in its article was a complaint in a will contest, its right to republish the allegations should be protected by both the principle of neutral reportage and "the broad constitutional privilege to report public information. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975)." Brief for Appellant at 30 n.6. While reports on judicial proceedings are protected by the common law privilege of fair report, *see supra*, notes 9 & 10 and Restatement (Second) of Torts §611 comment d, the Post-Gazette elected to limit this footnote argument to broad policy statements by the United States Supreme Court. However, in the brevity of its argument, the appellant fails to recognize the limited reading later given to *Cox Broadcasting*. In *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), the court interpreted *Cox Broadcasting* as applying to "the publication of the truthful information contained in official court records open to public inspection," *id.* at 455, but refused to "extend the reasoning of Cox Broadcasting to safeguard even inaccurate and false statements . . . ." *Id.*

Finally, in footnote seven, the Post-Gazette argues that the public official status of the plaintiff requires special protection for the media to report on issues affecting his qualifications. This, of course, is exactly what the *New York Times* actual malice standard does. Therefore, based on this argument, no further protection is required.

The appellant has not brought to our attention, nor has our independent research disclosed, any Pennsylvania decisions discussing the existence of a constitutional privilege of neutral reportage which would protect from liability a media defendant which reports defamatory statements made against public figures, regardless of the republisher's subjective awareness of the truth or falsity of the accusations. *But see Braig v. Field Communications*, 310 Pa. Super. 569, 587, 456 A.2d 1366, 1376 (1983), *allocatur denied, cert. denied*, 466 U.S. 970 (1984) (court implicitly rejected the neutral reportage doctrine by reversing summary judgment in favor of defendant television station on grounds that jury could find actual malice in rebroadcasting accusations of another where there was evidence that station general manager may have had "serious doubts" about truth of the underlying statements). The trial court, in discussing the Post-Gazette's reliance on *Edwards*, observed:

> Where the issue is whether the Defendant published the defamatory material with knowledge of its falsity or with serious subjective doubts in that regard, a fundamental consideration must accordingly be given to the source of the allegations which are alleged to be tortious. Where, as in *Time, Inc.*[11] and *Edwards*, the sources are official governmental records or the report of a renowned private institution, the publisher may justifiably rely on the materials contained therein and must only insure that the re-publication fairly and reasonably distills that which was contained in the original report. Such sources do not raise the "red

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[11] We have distinguished the Supreme Court holding in *Time, Inc. v. Pape, supra*, on grounds other than the *Pape* Court's reliance on the inherent credibility of the source of the defamatory information. It therefore will be unnecessary for us to address the Post-Gazette's argument that there is no language in *Pape* to suggest that the Supreme Court considered the commission report particularly reliable.

> flags" which the *St. Amant* [*v. Thompson*, 390 U.S. 727 (1968)[12]] Court identified, and, unless a plaintiff can prove more particular subjective knowledge on part of the publisher's [sic] that such otherwise credible sources are not to be believed, actual malice is not readily inferable.

Trial Court Opinion p. 14 (footnote omitted). The court than concluded that "[c]ertainly, in the context of this case, Robert Ciaffoni could not be considered a source of information as competent as the United States Civil Rights Commission or the National Audubon Society." *Id.* at 18. For this reason the court determined that *Edwards* did not assist the Post-Gazette.

This reliance on the language in *Edwards* which appears to limit its result to situations where the source of the republished defamation is "a responsible, prominent organization like the National Audubon Society," *Edwards*, 556 F.2d at 120, is not unique to the trial court. In *Cianci v. New Times Publishing Co.*, 639 F.2d 54 (2d Cir. 1980), the Second Circuit was faced with the application of its own doctrine in deciding whether the district court had been correct in dismissing a

[12] In developing its definition of actual malice, the trial court relied on *St. Amant* for the proposition that a defendant's protestations of belief in the truth of the statements published must be tested by the finder of fact to determine whether that belief was formed in good faith, *St. Amant*, 390 U.S. at 732, and observed:

> [T]he Supreme Court has noted that an absence of good faith could be determined where a story was fabricated by the defendant, represented the product of his imagination, or was based upon some anonymous or otherwise unreliable information. Additionally, the allegations themselves may be so inherently improbable that only a reckless publisher would circulate them. Furthermore, in the particular facts of the given case, there may be obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

Trial Court Opinion at 11-12 (citations omitted). These are the "red flags" to which the trial judge is referring.

complaint in libel. The Court of Appeals determined that the dismissal was error on the grounds that, *inter alia*, the defendant was not shielded by the constitutional privilege of neutral reportage. Prior to reaching this conclusion, however, the court felt it necessary to closely examine the language of the *Edwards* opinion to discern the scope of the privilege stated therein.[13]

In conducting this review, the court noted as limiting language

> the statements that "when a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of these charges, regardless of the reporter's private views regarding their validity"; that "[w]hat is newsworthy about these accusations in that they were made"; that "[t]he public interest in being fully informed about such controversies that rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them"; that while "we must provide immunity from defamation suits where the journalist believes, reasonably and in good faith that his report accurately conveys the charges made . . . [i]t is equally clear, however, that a publisher who in fact espouses or concurs in the charges made by others or who deliberately distorts these statements to

[13] It may initially seem uncertain whether the language in *Edwards* was intended to create doctrinal limitations or merely to be descriptive of the particular facts of the case. *See* Comment, *Constitutional Privilege to Republish Defamation*, 77 Columbia L.Rev. 1266, 1275-1276 (1977). However, when Chief Judge Kaufman, the author of *Edwards*, concurred in the decision in *Cianci* to deny a rehearing before the court en banc, *Cianci*, 639 F.2d at 71, it became apparent that he intended the former. Although he observed that "the panel [in *Cianci*] does not always discuss *Edwards* in the terms I would have chosen," *id.*, he was content that the opinion in *Cianci* was not inconsistent with *Edwards*.

> launch a personal attack of his own on a public figure, cannot rely on a privilege of neutral reportage" but rather "assumes responsibility for the underlying accusations"; that the Times had "published the maligned scientists' outraged reactions in the same article that contained the Society's attack"; that the article was "the exemplar of fair and dispassionate reporting of an unfortunate but newsworthy contretemps"; and that "[w]e believe that the *New York Times* cannot, consistently with the First Amendment, be afflicted with a libel judgment for the accurate reporting of newsworthy accusations made by a responsible and well-noted organization like the National Audubon Society." 556 F.2d at 120-22.

Cianci, 639 F.2d at 68-69 (footnote omitted). The court then observed that "[t]he New Times article fulfills almost none of the conditions laid down in *Edwards." id.* at 69, and concluded that "it is enough for decision in this case that a jury could well find that the New Times did not simply report the charges but espoused or concurred in them . . . ." *Id.*

Although the court bottoms its holding on the republisher's apparent adoption of the charges made, we are not constrained to read this as the only limitation to be placed on *Edwards.* After discussing how the evidence could be read to indicate an espousal of the charges, the court made the following statement:

> The need for the careful limitation of a constitutional privilege for fair reportage is demonstrated by the breadth of that defense, which confers immunity even for publishing statements believed to be untrue. Absent the qualifications set forth by Chief Judge Kaufman in *Edwards,* all elements of the media would have absolute immunity to espouse and concur in the most unwarranted attacks, at least upon any public

> official or figure, based on episodes long in the past and made by persons known to be of scant reliability. And this, although without any such immunity, the media already enjoy the generous protection accorded by *New York Times Co. v. Sullivan* with respect to erroneous statements of fact or opinion.

Id. at 69-70.

It is clear from the language of *Edwards* and *Cianci* that the privilege of neutral reportage is both limited and conditional, that is, it may be lost if its terms are not followed. *Binder v. Triangle Publishers, Inc.*, 442 Pa. 319, 324, 275 A.2d 53, 56 (1971) ("A qualified privilege is one that can be lost by abuse"). Drawing from the language quoted by the *Cianci* court, then, the rule can be stated as follows: A reporter is privileged to publish the serious charges of a responsible, prominent entity (either an organization or inidividual, as there is no reason to believe the *Edwards* court intended a distinction) involved in a raging controversy and concerning a public official or public figure, irrespective of the publisher's belief as to the falsity of the charges, provided the reporter does not espouse or concur in the charges and reasonably and in good faith believes the report accurately conveys the charges made. Therefore, entitlement to the privilege is determined by the following elements: (1) the character of the defamer; (2) the character of the controversy; and (3) the character of the defamed. The privilege is lost through abuse depending on the nature of the republication. *See* Comment, *Constitutional Privilege, supra*, note 13, at 1275-1281.[14]

[14] The *Cianci* court appears to have held that the privilege did not arise because the report could be found by the jury to have espoused or concurred in the charges. This, it seems, put the cart before the horse; the court decided that the privilege was abused before deciding whether, in fact, it ever attached. However, in terms of whether the

(Footnote continued on following page.)

Other courts applying the neutral reportage doctrine as a constitutional privilege have similarly limited *Edwards*. *See, e.g., Dixson v. Newsweek, Inc.*, 562 F.2d 626, 631 (1977) (the defamed party must be a public official or figure); *Lasky v. American Broadcasting Companies, Inc.*, 631 F.Supp 962, 970-971 (S.D.N.Y. 1986) (tracks *Cianci*); *Barry v. Time, Inc.*, 584 F.Supp. 1110, 1127 (N.D.Ca. 1984) (defamed in public figure involved in an existing controversy with the defamer); *McManus v. Doubleday & Co., Inc.*, 513 F.Supp. 1383, 1391 (S.D.N.Y. 1981) (limits to preexisting public controversies—not apply to investigative reporting); *Davis v. Keystone Printing Service, Inc.*, 155 Ill. App.3d 309, _____, 507 N.E.2d 1358, 1369 (1987) (defamed must be a public figure and defamer must be responsible prominent person); *Martin v. Wilson Publishing Co.*, 497 A.2d 322, 330 (R.I. 1985) (defamer must be prominent responsible organization). For additional cases see Note, *The Developing Privilege of Neutral Reportage*, 69 Va.L.Rev. 853, 864-865 nn.60-62 (1983). We are troubled by this formulation, however, because of the apparent absence of a constitutional foundation for this purported First Amendment protection. To better explain our conundrum we turn to cases which have expressly rejected the rule.

(Footnote continued from preceding page.)
defendant will be aided by the privilege, this observation is one of pure semantics, for, whether it is lost through defeasance, or never arises, is of little moment. But, in terms of practice, the observation is important. In Pennsylvania, the question whether a privilege applies in a defamation action is one for the trial court, *Smith v. Griffiths*, 327 Pa. Super. 418, 423, 476 A.2d 22, 25 (1984) *allocatur denied*, but it is for the jury to determine whether a privilege has been abused. *Sprague v. Walter*, 357 Pa. Super. 570, 604, 516 A.2d 706, 724 (1986) *allocatur granted*, _____ Pa. _____, 524 A.2d 495 (1987).

In light of our resolution of the question in the case *sub judice*, we need not expand on this discussion at the present time, leaving it for development when the court is faced with an appropriate set of facts.

The leading federal case in this category is *Dickey v. CBS, Inc.*, 583 F.2d 1221 (3d Cir. 1978).[15] In *Dickey*, the court refused to adopt *Edwards* on the grounds that the stated doctrine was contrary to established Supreme Court precedent. The court's refusal centered on the *Edwards* court's lack of concern for the publisher's reckless disregard of the truth and its effect on liability, and concluded that,

> [w]hile the Second Circuit found that there can be no liability despite the publisher's "serious doubts" as to the truthfulness, *St. Amant* [*v. Thompson*, 390 U.S. 727] holds that for libel against a public figure to be proved, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained *serious doubts* as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." 390 U.S. at 731, 88 S.Ct. at 1325.

Id. at 1225 (emphasis added by the Third Circuit).

The *Dickey* court concluded that the *Edwards* expression of a neutral reportage privilege also runs afoul of Supreme Court precedent when it establishes as the trigger for the constitutional protection the publication of a "newsworthy" statement. *Id.* at 1226 n.5. Using a standard based on the content of the statement for determining when the constitution will limit the States' powers to protect its citizens from

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[15] In *Medico v. Time, Inc.*, 643 F.2d 134 (3d Cir.) *cert. denied*, 454 U.S. 836 (1981), the court held that the *Dickey* court's refusal to follow *Edwards* was stated in dicta, thereby leaving the question of the viability of neutral reportage in this circuit open. *Id.* at 145. However, as we have observed, the rule itself was given life under similar circumstances, and because we are giving the rule serious consideration in spite of its questionable nascency, we see no reason to treat its critics any differently.

defamatory falsehoods, the court argues, was expressly rejected by the Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974) ("The 'public or general interest' test ... inadequately serves both of the competing values at stake"). *Accord Makis v. Area Publications Corp.*, 77 Ill.App.3d 452, _____, 395 N.E.2d 1185, 1193 (1979) (Romiti, J., dissenting) ("[I]t is not sufficient if the defamation concerns private persons involved in matters of public or general concern."); *Hogan v. Herald Co.*, 84 A.D. 2d 470, _____, 446 N.Y.S.2d 836, 842 *aff'd*, 58 N.Y.2d 630, 444 N.E.2d 1002 (1982) ("Presumably, all publications of the news media are newsworthy."). For additional cases, see Note, *Neutral Reportage, supra*, at 863 n.53.

A second line of cases has refused to recognize a constitutional privilege of neutral reportage on the grounds that such a privilege would be superfluous. For example, the Michigan Court of Appeals "decline[d] to embrace *Edwards* as the press is adequately protected by the burden of proof required in *Sullivan*." *Postill v. Booth Newspaper, Inc.*, 118 Mich.App. 608, _____, 325 N.W.2d 511, 578 (1982); *accord, Jonklow v. Viking Press, Inc.*, 378 N.W.2d 875, 881 (S.D. 1985) ("[T]he media already enjoys the generous protection accorded by *New York Times Co. v. Sullivan* with respect to erroneous statements of fact and opinion"). As an embodiment of both of these criticisms, an Illinois court concluded "that the constitutional limitations on the liability of the press for libel have been *fully* and *exclusively* expressed by the Supreme Court in *Time, Inc. v. Firestone* (1976), 424 U.S. 448, ... *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323, ... *Curtis Publishing Co. v. Butts* (1967), 383 U.S. 130, ... and *New York Times v. Sullivan* (1964), 376 U.S. 254, ..." *Newell v. Field Enterprises, Inc.*, 91 Ill.App.3d 735, _____, 415 N.E.2d 434, 452 (1980) (emphasis added).

We note, in support of this argument, that, at least at this stage in the development of the rule, no court choosing to rely on neutral reportage to protect a defamation defendant has had to do so exclusively. For example, in *Edwards* itself the court found that "[e]ven absent the special protection afforded to neutral reportage, ... the evidence adduced at trial was manifestly insufficient to demonstrate 'actual malice' on the part of the *Times*." *Edwards*, 556 F.2d at 120. Also, in *Barry v. Time, Inc.*, 584 F.Supp. 1110 (1984), an opinion enthusiastically embracing neutral reportage, the court granted a motion for summary judgment in favor of the publisher on the dual grounds that the amended complaint failed to plead actual malice with sufficient specificity, and that the publisher was constitutionally protected by the privilege of neutral reportage.

The criticism that the rule is superfluous, however, misses the intent of the neutral report privileged as expressed in *Edwards*. The privilege is superfluous only if its protection is coextensive with actual malice. It is not. As we have seen, under *New York Times Co. v. Sullivan, supra*, the Constitution protects the publishing of defamatory falsehoods unless it is shown "that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 279-280. The doctrine of neutral reportage anticipates a broader protection than this, believing "that the press may [not] be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth." *Edwards*, 556 F.2d at 120. Thus, while the two doctrines overlap when actual malice cannot be shown, and a separate privilege of neutral reportage would indeed be redundant, when knowledge of or a reckless disregard as to falsity exists,

it is clear that neutral reportage stands alone in asserting a constitutional privilege to publish. This, then, is the context within which we must analyze neutral reportage.

Although this conclusion is sufficient to dispose of the redundancy argument, it is merely the first step in deciding whether *Edwards* runs afoul of *New York Times* and its progeny. For this broader First Amendment protection to stand, a basis in the Constitution must be found other than that which justifies the requirement of actual malice. Otherwise, the privilege of neutral reporting must fail because it would upset the balance already struck by the Supreme Court in protecting our constitutional freedoms of expression and the countervailing state interest in protecting reputation.

Proof of actual malice was deemed necessary because of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times,* 376 U.S. at 270. Even the occasional erroneous statement, inevitable in free debate, "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' " *Id.* at 271-272.

Thus, in order to protect our system of self-government by guaranteeing the free flow of information essential to that purpose, those who have sought official positions within the government (public officials) and those who have "assumed roles of especial prominence in the affairs of society" (public figures), *Gertz,* 418 U.S. at 345, must endure the publication of defamatory falsehoods so long as it is done without actual malice. However, this does not amount to a blanket protection

for all falsehoods; rather, "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 341. Therefore, the actual malice standard continues to recognize that "[n]either the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Id.* at 340 (citation omitted).

In *Herbert v. Lando*, 441 U.S. 153 (1979), the Supreme Court reasserted the breadth of the actual malice protections when it refused to acknowledge a chilling effect on editorial decision-making if public defamation plaintiffs are allowed to inquire into the editorial processes of the defendant, noting that, "if the claimed inhibition flows from the fear of damages liability for publishing knowing or reckless falsehoods, those effects are precisely what *New York Times* and other cases have held to be consistent with the First Amendment. Spreading false information in and of itself carries no First Amendment credentials." *Id.* at 171. It is clear, then, that neutral reportage, which seeks to protect the knowing publication of falsehoods, would indeed upset this balance if placed on the actual malice scale.

In attempting to provide a constitutional foundation for neutral reportage, the *Edwards* court relied on the rationale of the "public's need to know," by noting that "[t]he public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report [defamatory] charges without assuming responsibility for them." *Edwards*, 556 F.2d at 120. However, the court distanced itself from the rationale behind the actual malice standard when it stated that "[w]hat is newsworthy about [serious charges made by a

prominent organization against a public figure] is that they were made," *id.*, thereby finding the constitutional value of the statement in the nature of the defamer and his relationship to the controversy, not in the status of the person defamed.

We reach this conclusion for the compelling reason that, if the focus was on the party defamed, the balance struck by actual malice would be offended if not followed. Therefore, the speech which is to be protected by neutral reportage is not the defamatory falsehood itself, but the speech required to convey the information that a certain individual involved in a controversy made a particular charge. Describing the protected speech in this manner helps to explain why, with neutral reportage, the subjective awareness of the republisher that the statement is false becomes irrelevant. An analogy may be drawn to the hearsay rule of evidence. Where the out of court statement is offered to prove the truth of the matter asserted in the statement, it will be excluded; but if the fact that the statement was made has significance independent of its truth, it will be admitted. *See,* Note, *Neutral Reportage, supra,* at 867 n.75.

Recognizing the belief that "no statement is significant merely because it is said unless the identity if the speaker has some special significance," Comment, *Constitutional Privilege, supra* note 13, at 1276, we now return to our concern about the *Edwards* statement of the neutral reportage doctrine. As we have noted, *Edwards,* and *Cianci* interpreting *Edwards,* focused on the prominence and reliability of the original defamer to determine whether the protections of neutral reportage should apply. Neither of these criteria, however, are sufficiently related to the First Amendment interests in protecting the republished defamation to serve as the basis for a constitutional privilege.

The mere fact that a speaker is known to be reliable is not sufficient to entitle that person's words to constitutional protection irrespective of the reporter's knowledge that the statement is false. In fact, because neutral reportage intends to protect the publication of statements known to be false, the purported reliability of the source is totally irrelevant.[16] Conversely, the unreliability of a speaker should not automatically disqualify his words from protection. For example, in *Oliver v. Village Voice, Inc.*, 417 F.Supp. 235 (S.D.N.Y. 1976), decided before *Edwards*, the court granted summary judgment for the defendant on the issue of actual malice over the plaintiff's protestations that the informant, Watergate figure E. Howard Hunt, Jr., was inherently unreliable, stating that "the mere fact of [Hunt's] making a statement, given his prominent position in the Watergate controversy, would be a legitimate news story." *Id.* at 238. In criticizing a "reliability" standard, the court in *Barry v. Time, Inc.*, *supra*, noted the absence of "a cogent policy reason for differentiating among defamers on the basis of their trustworthiness or credibility. Indeed, the primary rationale of *Edwards*—the public interest in being fully informed about public controversies—is inconsistent with such a differentiation. Moreover, it could create a chilling effect on the members of the press if they are required to be arbiters of how 'trustworthy' a source is." *Barry*, 584 F.Supp. at 1126.

[16] The reliability of the defaming party was deemed relevant in determining whether the publisher acted with reckless disregard for the truth of the published statement at the very genesis of the actual malice rule. In *New York Times*, the Supreme Court found that the publishers' reliance "upon their knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement . . . was not unreasonable." *New York Times*, 376 U.S. at 287. In neutral reportage, however, the issue is not the publisher's subjective awareness of falsity because that is assumed. *See supra.*

However, the *Edwards* court's reliance on the prominence of the defaming party shows greater promise in furthering the rule's purpose of protecting the free dissemination of information about public issues. As we have noted, a defamatory falsehood has no constitutional value and does not enhance our system of self-government. However, if the speaker of the defamatory falsehood has a significance to the controversy at issue, the reporting of that falsehood takes on an importance independent of the substance of the statement. For example, if a state's governor falsely accuses the mayor of one of that state's major cities of mismanagement, the reporting of this charge gives the electorate a valuable insight into the character of their state's top official.

Similarly, when a private advocacy group seeks a role in shaping public policy, a circumstance strongly encouraged in this country, the reporting of false charges by that group will allow the public to define for itself the credibility, or even desirability of that group's proposals for reform. As the Supreme Court recognized in *New York Times,* "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.' " *New York Times,* 376 U.S. at 279 n.19 (citation omitted).

Therefore, the newsworthiness of the statement stems from the importance of the speaker to the controversy at issue and the fact that anything he says has value within the context of that controversy. This conclusion neutralizes the criticism that a neutral reportage privilege violates the teaching of *Gertz,* where the Supreme Court refused to accept as a triggering device for the actual malice standard whether the publication is

newsworthy because it addresses issues of "general or public interest." *Gertz*, 418 U.S. at 346. Newsworthiness, in the neutral reportage sense, is not based on an analysis of the content of the speech to be protected; rather, it is determined by the status of the defaming party.

The final issue in describing the neutral reportage doctrine, then, is how to determine when a defamer is sufficiently prominent to make his or her statements newsworthy. The logical solution appears to be the adoption of the same public figure/public official standard applied to the plaintiff in an actual malice situation. If the party making the false charge is a public official, it is essential for the public to be informed of the calumny of those upon whom it has bestowed its trust, and thereby to better supervise their conduct. Similarly, if a public figure, embroiled in a controversy, levels false accusations against others involved in the same contest, the public's ability to weigh the merits of the vying positions is greatly enhanced by the publication of the charges. In addition to the appropriateness of these classifications to the constitutional purposes of neutral reportage protection, there is the added advantage that the mechanism for determining whether an individual can be fairly classified as either a public figure or public official is already firmly in place.

Therefore, we hold that if neutral reportage is to be recognized as a constitutional privilege, it can offer protection irrespective of the publisher's belief in the truth or falsity of the charges only when a public official or a public figure already embroiled in a public controversy levels a false charge against a public official or figure. The privilege, once it has arisen, will be preserved only if the reporter neither espouses nor

concurs in the charge and in good faith believes the report accurately conveys the charges made. Because the facts of this case do not fit into the above statement of the privilege, we cannot now hold that the constitutional privilege of neutral reporting will be recognized in Pennsylvania, and do not so hold.

Of the three requirements necessary to invoke the privilege, only the third element, the status of the defamed party, has been met. The party making the charge, Robert Ciaffoni, is not and does not claim to be either a public official or a public figure, and the bitter dispute over the validity of Paul Ciaffoni's will, while perhaps of some interest to the public, is not the type of controversy about which the public needs to be informed to better exercise the right of self-government. Therefore, the question of a constitutional privilege of neutral reporting must remain open in this jurisdiction until the court is presented with a proper case. We hold that the trial court did not err in its application of the *New York Times* actual malice standard, nor did it err in instructing the jury on that standard.

II

COMPENSATORY DAMAGES

The second category of error raised by the appellant asserts that the trial court was remiss in permitting the jury to assess compensatory damages for present or future harm where the trial record discloses no evidence to even suggest that the appellees were suffering or might suffer any present or future harm as a result of the article. The appellees respond that this issue, while preserved by objection following the trial court's charge to the jury and raised in the appellant's motion for new

trial, was abandoned when the appellant failed to brief or argue the issue to the trial court and therefore was not preserved for our review. We agree.

Post-trial practice is governed by Pa. R.C.P. 227.1, which requires timely objection and specific mention in a post-trial motion before an issue may be considered by the post-trial court. Pa. R.C.P. 227.1(b). The purpose for this rule is to afford the trial court the opportunity to correct an error at the time it is made, and to inform the court of the issues which must be decided at the post-trial stage, *id.*, Explanatory Comment—1983, thereby giving it the first opportunity "to review and reconsider the determination it made at trial." *Weir by Gasper v. Ciao*, _____ Pa. Super. _____, _____, 528 A.2d 616, 618 (1987).

To fully effectuate the latter purpose, common sense mandates that any issue raised in the motion for post-trial relief must also be briefed and argued to the trial court. Thus, this court, after stating the requirements of rule 227.1(b), went on to note that, "[m]oreover, failure to set forth an argument in briefs filed in the court in support of post-trial motions constitutes a failure to preserve the issue or issues not argued." *Bryant v. Girard Bank*, 358 Pa. Super. 335, 344, 517 A.2d 968, 973 (1986). The appellant did not list as an issue in its brief in support of post-trial motions any challenge to the compensatory damages awarded by the jury, nor did the argument contained therein assert such a challenge in the context of any related issues.[17]

[17] The appellees also assert that a challenge was not made to the compensatory damage award during oral argument. The appellant counters that no transcript of the oral argument was made and therefore that such a statement is at best conjecture. Conspicuously, the appellant does not further assert that it did raise the issue in oral argument.

This failure "deprived the trial court of both the need and opportunity to address the merits of the [appellant's] post-trial contentions in this regard," *Scarborough by Scarborough v. Lewis*, 359 Pa. Super. 57, 62-63, 518 A.2d 563, 566 (1986), leaving us, as an appellate court, with nothing to review. We therefore hold that the appellant's challenge to the compensatory damages award has been waived and may not serve as a basis for relief.

III

PUNITIVE DAMAGES

The final challenge made by the appellant concerns the award of $2,000,000.00 in punitive damages. This challenge asserts two levels of error on the part of the trial court: first, that the trial court erred in allowing the jury to assess punitive damages at all; and second, that the trial court failed to properly limit the amount of the punitive damages awarded. We find no error.

A. Liability

In pressing its argument that the trial court should not have submitted the issue of punitive damages to the jury at all, the Post-Gazette asserts that the standard applied in determining whether a jury question existed was insufficient to protect its constitutional rights under the First Amendment. The trial court, in deciding to put the question to the jury, considered punitive damages appropriate only if both actual malice and common law malice were established by clear and convincing evidence. Actual malice, as we have seen, involves publication with "knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 278-279. Common law malice, in the context of punitive damages, involves " 'conduct that is

outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others,' . . . 'conduct which is " 'malicious,' 'wanton,' 'reckless,' 'willful,' or 'oppressive' . . . ." ' " *Feld v. Merriam*, 506 Pa. 383, 395, 485 A.2d 742, 747-748 (1984) (citations omitted) (adopting Restatement (Second) of Torts §908(2)). "Punitive damages may be given when the act is done with reckless indifference, as well as, bad motive." *Delahanty v. First National Bank, N.A.*, 318 Pa. Super. 90, 130, 464 A.2d 1243, 1263 (1983).

The Post-Gazette, not challenging the sufficiency of the evidence under either of these standards,[18] urges that punitive damages should only be allowed when the evidence shows *actual* knowledge of falsity and *actual* intent to harm. Its argument is that, by allowing the jury to consider recklessness, that is, reckless disregard of falsity and reckless indifference to the plaintiff's rights, an award of punitive damages could be made based solely on such a determination, which would not sufficiently protect robust reporting. We find no basis for this "actualness" standard in the law, or in logic.

We again begin our analysis with the federal Constitution because of the First Amendment issues involved. The United States Supreme Court, to date, has not asserted any constitutional constraints on the awarding of punitive damages to a public official in a defamation action. In the context of a private figure libel suit, the Court has directed that, while liability may be decided by any standard which necessarily involves a

[18] In section I of this opinion we disposed of the appellant's challenge to the definition of actual malice put to the jury. However, in that challenge, the appellant did not assert that the evidence was insufficient to meet the *New York Times* statement of actual malice as it has evolved since 1964, which we determined the trial court correctly articulated.

finding of fault, punitive damages may not be allowed unless there has been "a showing of knowledge of falsity or reckless disregard for the truth." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). The rationale for this distinction recognizes that the states have a "strong and legitimate ... interest in compensating private individuals for injury to reputation," *id.* at 348, but that "punitive damages are wholly irrelevant to [this] state interest ...," and that "jury discretion to award [such] damages unnecessarily exacerbates the danger of media self-censorship." *Id.* at 350.

Although the Post-Gazette would have us read the logic of *Gertz* as "point[ing] ineluctably to the conclusion that punitive damages may never be awarded in defamation cases," Brief for Appellant at 34 n.8, the concurring opinion of Justice Blackmun, who voted to join the opinion of the Court on the ground that his vote was necessary to create a majority, *Gertz*, 418 U.S. at 354, clearly indicates the contrary. Commenting on the court's holding that actual malice must be proven before punitive damages may be awarded, he concluded that "the court leaves what should prove to be sufficient and adequate breathing space for a vigorous press." *Id.* Further evidence of the continuing constitutionality of punitive damages in defamation cases came recently in *Dun & Bradstreet, Inc. v. Greenmoss Buildings, Inc.*, 472 U.S. 749 (1985) (Powell, J., announcing the judgment of the court).

The plurality in *Greenmoss Builders* found relevance in the fact that *Gertz*, while not involving either public official or public figure, did involve a publication which touched upon matters of public concern. *Id.* at 757. Noting that the communication in *Greenmoss Builders* concerned matters of purely private concern (inaccurate

confidential credit reports), the plurality applied the *Gertz* analysis balancing the state interest in protecting reputation against the First Amendment interest in protecting expression, and concluded that, "[i]n light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of 'actual malice.' " *Id.* at 761 (footnote omitted).

The facts in *Greenmoss Builders,* however, diverge from *Gertz* in the wrong direction to be of immediate assistance to us on the issue of punitive damages in this case. *Greenmoss Builders* suggests that when the public configuration of a defamation case is less than that presented in *Gertz,* that is, private plaintiff/private speech versus private plaintiff/public speech, the standard to be applied in the awarding of punitive damages need not include actual malice. The question we face is what standard to apply when the plaintiff is a public official rather than a private individual. Because speech about a public official is, by definition, of public concern, there is no need to discuss the characterization of the nature of speech here.[19] Therefore the only

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[19] In one of the Supreme Court's recent defamation decisions, *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767 (1986), Justice O'Connor recognized

> two forces that may reshape the common-law landscape to conform to the First Amendment. The first is whether the plaintiff is a public official or figure, or is instead a private figure. The second is whether the speech at issue is of public concern. When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by

(Footnote continued on following page.)

relevant factual distinction between the instant case and *Gertz* is the public status of the plaintiffs. We conclude that, in the context of punitive damages, the same standard required by *Gertz* would be required where the plaintiff is a public official.

We reach this conclusion by contrasting the *Gertz* Court's discussion of liability with its discussion of punitive damages, as did the Court in *Greenmoss Builders*. In holding that the states may impose *liability* for defamation against private individuals on a less demanding showing than actual malice, the Court had "no difficulty in distinguishing among defamation plaintiffs." *Gertz*, 418 U.S. at 344. As part of this distinction, the Court emphasized that a private plaintiff has less access to the self-help remedy of rebuttal, and that the private plaintiff has not put himself in a position of having to accept the risk of closer public scrutiny. *Id.* at 344-345. "For these reasons we conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory

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(Footnote continued from preceding page.)

> the common law. When the speech is of public concern but the plaintiff is a private figure, as in Gertz, the Constitution still supplants the standards of the common law, but the constitutional requirements are, in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern. When the speech is of exclusively private concern and the plaintiff is a private figure, as in Dun & Bradstreet, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.

Id. at 775. Although this characterization leaves open the theoretical possibility of a public plaintiff and a private concern, Justice O'Connor does not discuss the constitutional ramifications of such a configuration. Further, we doubt the significance of such a possibility in light of the Court's expansive reading of the "official conduct" element in the actual malice formula. *See supra* Section IA.

falsehood injurious to the reputation of a private individual." *Id.* at 345-346. Thus, it is the strength of the state's legitimate interest in providing a legal remedy which forces the different *liability* standards in public plaintiff versus private plaintiff defamation actions.

In its discussion of *punitive damages,* however, the court disavowed any public/private distinction by holding that the resultant "countervailing state interest extends no further than compensation for actual injury," *id.* at 349, and later noting that "punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for [liability in] private defamation actions." *Id.* at 350. Thus, the court's concern that "jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship," *id.,* exists with equal force whether the plaintiff is public or private, and any limitations on the recovery of punitive damages would apply equally in either case.

Therefore, in order to hold that something more than actual malice is constitutionally required for a public official versus a private individual to recover punitive damages in a defamation action, as the Post-Gazette would have us do, we must conclude that the Supreme Court would find it necessary to fashion an entirely new First Amendment rationale when faced with the question. We see no such indication in the Court's recent pronouncements. *See Greenmoss Builders, supra; see also, id.* at 780 (Brennan, J., dissenting, joined by Marshall, Blackmun, and Stevens, JJ.) (as to punitive damages, when the plaintiff is a public official or figure, "the need to nurture robust debate of public issues and the requirement that *all* state regulation of speech be narrowly tailored coalesce to require actual malice as a prerequisite to *any* recovery." (emphasis added)). In fact, when asked to modify the actual malice standard to

further protect the press in *Herbert v. Lando*, 441 U.S. 153 (1979), the Court refused, noting that "in the 15 years since New York Times, the doctrine announced by that case, which represented a major development and which is widely perceived as essentially protective of press freedoms, has been repeatedly affirmed as the appropriate First Amendment standard applicable in libel actions brought by public officials and public figures." *Id.* at 169. To the extent that the appellant argues for greater protection on the grounds that a public plaintiff must prove actual malice to establish liability, and should be required to prove more to recover punitive damages, we note that the Supreme Court has never held that the Constitution mandates such an escalation in the standard of proof between compensatory and punitive damages. *See Smith v. Wade*, 461 U.S. 30, 53-54 (1983); *Curtis Publishing Co. v. Butts*, 388 U.S. at 159.

Our conclusion that proof of actual malice by a public official is constitutionally sufficient to trigger a jury's consideration of punitive damages is not the end of the inquiry, however. We must now determine whether Pennsylvania offers greater protection than that which the federal Constitution requires. Again we find no cases directly addressing the issue. Before actual malice was introduced into the defamation formula for punitive damages, proof of common law malice was required to recover punitive damages, *Purcell v. Westinghouse Broadcasting Co.*, 411 Pa. 167, 186-187, 191 A.2d 662 (1963). With the decision in *Gertz*, Pennsylvania added the requirement of actual malice. *Hepps v. Philadelphia Newspapers, Inc.*, 506 Pa. 304, 485 A.2d 374 (1984), *rev'd on other grounds*, 475 U.S. 767 (1986); *Sprague v. Walter*, 357 Pa. Super. 570, 516 A.2d 706 (1986) *allocatur granted*, _____ Pa. _____, 524 A.2d 495 (1987); *Banas v. Matthews International Corp.*, 348 Pa. Super.

464, 502 A.2d 637 (1985) (en banc), *allowance of appeal denied* (1986); *Walder v. Lobel*, 339 Pa. Super. 203, 488 A.2d 622 (1985); and *Wilson v. Benjamin*, 332 Pa. Super. 211, 481 A.2d 328 (1984). What none of these cases expressly considers, however, is whether there is a continuing need to show common law malice.

Thus, in *Sprague, supra*, the court expressly required actual malice without mentioning common law malice, but the court's opinion disclosed evidence of common law malice. *Sprague*, 357 Pa. Super. at 610, 516 A.2d at 727. In *Banas, supra* at 470, 502 A.2d at 640 and *Wilson, supra* at 220, 481 A.2d at 332, the court had no opportunity to reach the issue because punitive damages were precluded by a failure to prove actual malice. In *Walder, supra*, the result is especially difficult to interpret because the court purports to require "actual malice," but cites to *Feld v. Merriam, supra*, a non-defamation case which relied exclusively on common law malice. *Walder*, 339 Pa. Super. at 211, 488 A.2d at 626 (1985).

Two cases, however, do suggest that Pennsylvania may continue to require a showing of common law malice, even when actual malice is required. Our supreme court in *Hepps, supra*, like the courts in *Banas* and *Wilson, supra*, did not reach the issue of common law malice because it disposed of the punitive damages issue on the ground that actual malice was not established. *Hepps*, 506 Pa. at 330, 485 A.2d at 388. However, in discussing the sufficiency of the evidence to show actual malice, the court noted that "[t]he publisher's hatred, spite, hostility or deliberate intention to harm the plaintiff is not sufficiently probative of his knowledge of falsity or awareness of probable falsity so as to allow its admissibility where 'actual malice' is at issue, *but once*

established, the elements heretofore enumerated would be admissible." *Id.* at 331, 485 A.2d at 388 (emphasis added). The issue was punitive damages. If the "elements heretofore enumerated" were admissible, but not for the purpose of proving actual malice, the only other purpose would be to prove common law malice. Therefore, unless proof of common law malice was implicitly considered necessary by the supreme court for an award of punitive damages, the language we have emphasized would be mere surplusage.

This interpretation of *Hepps* may have been the basis for the Third Circuit Court of Appeals' conclusion in *Marcone v. Penthouse International Magazine for Men*, 754 F.2d 1072 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985), a public figure defamation case, that "[t]he district judge's instruction that plaintiff had to prove 'outrageous conduct' [to recover punitive damages] appears to be an accurate reflection of Pennsylvania law. However, to be permissible, the charge also had to meet the First Amendment requirements established by the Supreme Court." *Id.* at 1088 (footnote to *Hepps* omitted).[20]

In the second case, *Frisk v. News Co.*, 361 Pa. Super. 536, 523 A.2d 347 (1986) *allocatur denied*, _____ Pa. _____, 530 A.2d 867 (1987), the issue of the proper standard to be applied in submitting the issue of punitive damages to the jury was not expressly addressed. However, the court held that, in light of the defendant's conduct, the punitive damage award as remitted was appropriate, and cited to *Marcone v.*

[20] The court's requirement that the charge on punitive damages must include "actual malice" is not to be understood as requiring that the definition of actual malice must be repeated if it has already been given in the charge on liability. The trial court in *Marcone* had ruled that the plaintiff was a private figure and therefore had not included actual malice in its charge on liability.

Penthouse International, Ltd., 577 F.Supp. 318 (E.D. Pa. 1983) *rev'd sub nom. Marcone v. Penthouse International Magazine for Men, supra* (requiring actual malice and common law malice for recovery of punitive damages under Pennsylvania law), and *Purcell v. Westinghouse Broadcasting Co., supra* (pre-actual malice decision stating the rule in terms of common law malice). *Frisk*, 361 Pa. Super. at 549, 523 A.2d at 353.[21]

The appellant cites us to *Geyer v. Steinbronn*, 351 Pa. Super. 536, 506 A.2d 901 (1986) for the proposition that punitive damages are appropriate only when the defendant's conduct is more egregious than that which is required to establish liability. *Id.* at 562, 506 A.2d at 915. However, as the Post-Gazette reluctantly notes, the *Geyer* opinion footnotes this statement with a recognition that an apparent exception to the rule is the case where proof of actual malice is required to establish liability. *Id.* at 562 n.10, 506 A.2d at 915 n.10. Therefore, the appellant's reliance on this principal, previously rejected as a constitutional requirement, *supra*, must also be rejected as an element of Pennsylvania precedent in this case.

The appellant nonetheless argues that the result in *Geyer* mandates the "more egregious" rule it proposes. *Geyer* was a private plaintiff/private issue case decided in the wake of the United States Supreme Court's decision in *Greenmoss Builders, supra*. Judge Beck, writing alone on the proper standard to be applied for

[21] In a footnote to this discussion, the court answered the appellant's contention that punitive damages are constitutionally impermissible in public figure libel actions by quoting from Justice Harlan's plurality opinion in *Curtis Publishing Co. v. Butts, supra*, to the effect that misconduct sufficient to justify compensatory damages also justifies punitive damages. *Frisk*, 361 Pa. Super. at 549 n.4, 523 A.2d at 353 n.4. The apparent inconsistency need not be reconciled, however, because the issue in the footnote was entirely different from the issue in the text.

the allowance of punitive damages in such a case,[22] reasoned that, in spite of *Greenmoss Builders*, the proper course was to require proof of actual malice. However, she did not reach this conclusion on the ground that actual malice was more egregious conduct, as the Post-Gazette suggests. Rather, she noted that the purpose of punitive damages is to punish past conduct and to deter further repetition, *Geyer*, 351 Pa. Super. at 562, 506 A.2d at 915, and, juxtaposing actual malice and common law malice as definitions of two types of blameworthy conduct, she decided that actual malice describes "more clearly the kind of intentionally wrongful conduct which should be the subject of our concern in imposing punitive damages in defamation actions." *Id.* at 563, 506 A.2d at 915.

Therefore, even under *Geyer*, we are not looking for egregious conduct in the quantitative sense when setting a standard for the award of punitive damages, the appellant's "more egregious" argument; rather, we are looking for egregious conduct in the qualitative sense, that is, the type of conduct to be sanctioned. Having rejected the "more egregious" rule, we find no basis for adopting the Post-Gazette's limitation of punishable conduct to actual knowledge of falsity and actual intent to harm. The "recklessness" components of both the actual malice and common law malice standards have always been considered sufficient indicia of the respective conduct sought to be sanctioned to serve the intended purposes.

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[22] The *Geyer* panel was comprised of (then) President Judge Spaeth, and Judges Beck and Tamilia. Judge Beck wrote the opinion for the panel. President Judge Spaeth concurred in the result, but did not join in Judge Beck's discussion of punitive damages, feeling that our supreme court's opinion in *Hepps* established the law in the Commonwealth and that *Greenmoss Builders* was irrelevant. Judge Tamilia joined the majority opinion except on the issue of punitive damages, where he joined the President Judge.

However, this does not answer the question left open in *Geyer* as to what is to be the standard for allowing punitive damages in a defamation action where the plaintiff is a public official. If we embrace Judge Beck's conclusion that actual malice represents the type of conduct to be sanctioned by punitive damages in defamation actions, we must hold that a public official who proves actual malice to establish liability is automatically entitled to have the question of punitive damages considered by the jury, and end our discussion here. But, we are constrained to feel that, under these circumstances, common law malice better describes the conduct to be punished, and therefore we must continue our analysis.

As we noted earlier, Pennsylvania has adopted the guideline of Section 908(2) of the Restatement (Second) of Torts on the question of punitive damages in general, and has developed the requirement of common law malice around conduct which has variously been described as "outrageous," "malicious," "wanton," "reckless," "willful," "oppressive," the result of "bad motive," or "reckless indifference to the rights of others." *Feld v. Merriam,* 506 Pa. at 395, 485 A.2d at 747-748. Thus, when a defendant acts with common law malice, and thereby becomes susceptible to punitive damages, he does so with a necessary degree of evil volition toward the plaintiff. Stated differently, common law malice "focuses not on the nature or category of the tort, but rather on the defendant's disposition toward the plaintiff at the time of the wrongful act." Note, *Punitive Damages and Libel Law,* 98 Harv.L.Rev. 847, 852 (1985).

Actual malice, on the other hand, focuses exclusively on the defendant's attitude toward the truth of the statement made, it being expressly understood that "ill

will toward the plaintiff, or bad motives, are not elements of the actual malice standard." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 n.18 (1971) (plurality opinion); *Hepps*, 506 Pa. at 331, 485 A.2d at 388. The Supreme Court very recently reasserted this interpretation of actual malice in *Hustler Magazine v. Falwell*, 56 U.S.L.W. 4180 (1988), when it rejected the Court of Appeals for the Fourth Circuit's view that "the *New York Times* decision emphasized the constitutional importance not of the falsity of the statement or the defendant's disregard for the truth, but of the heightened level of culpability embodied in the requirement of 'knowing . . . or reckless' conduct." *Id.* at 4180. Chief Justice Rehnquist, joined by six justices, reiterated the consistent holding of the Court since *New York Times* was decided that actual malice, when applicable, is intended to ferret out deliberate or reckless falsehoods, not hatred or ill-will on the part of the speaker or writer. *Id.* at 4181. Thus, the definition of actual malice is uniquely crafted to identify, in a constitutional context, what speech is to be protected and, conversely, what speech the states may regulate in the interest of protecting reputations through compensation. But punitive damages are not compensation; rather, they are awarded "to punish the wrongdoer and to deter both him and others from engaging in similar conduct in the future." *Delahanty v. First National Bank, N.A.*, 318 Pa. Super. at 129, 464 A.2d at 1263; Restatement (Second) of Torts §908, comment a.

In *Geyer*, Judge Beck, explaining her preference for actual malice over common law malice as the standard for awarding punitive damages, reasoned that, "[a]lthough the 'ill will' component of common law malice clearly involves conduct directly intended to harm the

plaintiff, actual malice conduct is equally intentional with respect to the falsity of the publication," *Geyer,* 351 Pa. Super. at 563, 506 A.2d at 915-196, and that, because "[i]n its essence the law of libel is concerned with the harm which may be done to a citizen's reputation by the communication of false and defamatory statements, . . . [t]he wrongful act, . . . i.e. the act which causes the harm to the plaintiff, is therefore the publication of the libelous words, not the holding of a malevolent or spiteful attitude toward the plaintiff." *Id.* at 564, 506 A.2d at 916. From this, she concluded that one cannot publish with actual malice and not also demonstrate at least the rudiments of common law malice, noting that "even if the immediate motive of the deliberate or reckless liar may not be to harm the plaintiff, he does at least have reason to know that harm may result from his conduct." *Id.* at 564-565, 506 A.2d at 916.

The issue with punitive damages, however, is intentional harm, not intentional conduct which causes harm. While we do not dispute that publishing with actual malice often may be difficult to distinguish from publishing with an intent to harm, *see, e.g., Schiavone Construction Co. v. Time, Inc.,* 646 F.Supp. 1511, 1518 (D.N.J. 1986) (finding no meaningful difference), we are not prepared at this time to say as a matter of law that no distinction exists. Because it is well settled in Pennsylvania that "the decision of whether to award punitive damages . . . [is] within the discretion of the fact finder," *Delahanty,* 318 Pa. Super. at 129, 464 A.2d at 1263, we feel it the better course to leave this determination to the jury under proper instructions.

Judge Beck further argued "that the actual malice standard better meets the goals behind the policy of deterrence . . . [because c]ourts and laws cannot

realistically 'deter' someone from disliking or hating another . . . [but] the law can encourage a person to be more careful about what he says publicly about another, including the object of his ill will." *Geyer,* 351 Pa. Super. at 565, 506 A.2d at 916. This conclusion, however, misapprehends the deterrent purpose of punitive damages. Although it is true that one cannot realistically be deterred from harboring feelings of ill will toward another, one can be deterred from acting on that ill will in such a way as to harm the other. This is precisely the deterrent objective of punitive damages.

As we recently observed, "[c]ourts in libel cases should be guided by the same general rules regarding damages that govern other types of tort recovery." *Agriss v. Roadway Express, Inc.,* 334 Pa. Super. 295, 329, 483 A.2d 456, 474 (1984) *allowance of appeal denied.*[23] Therefore, perceiving no reason to abandon the traditional requirement for a showing of actual or apparent ill will toward the plaintiff before allowing punitive damages, we hold that a public official, who must prove actual malice to establish liability in a defamation action, may not also recover punitive damages absent an additional finding that the defendant acted with common law malice in publishing the defamatory statement.

With this conclusion we do not join the debate whether actual malice or common law malice, is "more evil," or whether punitive damages may be allowed only when the offending conduct is more egregious than that required

[23] In a footnote to the above quoted passage, we added that "[o]f course, the First Amendment places outer limits on the recovery of punitive damages. . . ." *Agriss,* 334 Pa. Super. at 329 n.9, 483 A.2d at 474 n.9. This editorial observation indicates both that we intended to include *punitive* damages within the scope of our comment, and that constitutional constraints are not to be viewed as exclusive limitations on such damages.

to establish the underlying tort. Our holding today rests on the simple, but important, proposition that, in public official defamation actions, punitive damages are intended to punish and deter publication with actual or apparent ill will and, therefore, that the award of punitive damages must be limited to those cases where common law malice is shown.

On the issue of entitlement to punitive damages, the trial judge charged the jury as follows:

> If you find by clear and convincing evidence that the conduct of the Defendant was outrageous, you may award punitive damages as well as compensatory damages in order to punish the Defendant for the conduct and to deter the Defendant and others from doing similar acts. A person's conduct is outrageous when he acts with a bad motive or when he acts with reckless indifference for the interests of others.

R.R. at 1745a. This charge tracks almost verbatim the Pennsylvania Selected Standard Jury Instruction (Civil) §14.00—Punitive Damages (1984), which is based on the Restatement of Torts §908(1) and which, as we have seen, is the law in Pennsylvania on punitive damages.[24] We therefore find no error on the part of the trial court in its presentation of this issue to the jury. Because the

[24] The standard of proof for punitive damages in Pennsylvania traditionally has been proof by a preponderance of the evidence. *Martin v. Johns-Manville Corp.*, 508 Pa. 154, 173, 494 A.2d 1088, 1098 (1985). To the extent that the Post-Gazette would argue for a more rigorous standard, the *Martin* court observed, in the context of product liability litigation, that the goal of limiting punitive damage awards "is best served by focusing on the nature of the defendant's conduct instead of increasing the plaintiff's burden of persuasion." *Id.* at 173 n.14, 494 A.2d at 1098 n.14. However, we need not decide this question because the trial judge charged the jury that they could not award punitive damages unless they found "by clear and convincing evidence" that the conduct of the Post-Gazette was outrageous. The appellant cannot now complain of this.

Post-Gazette does not challenge the sufficiency of the evidence under this standard, we may proceed to the final issue presented on this appeal.

B. Excessiveness

The Post-Gazette finally avers that, even allowing that the jury properly considered the issue of punitive damages, the trial court failed to adequately limit those damages in accordance with constitutional mandates and state law principles. This failure, it argues, is manifest in both the court's charge to the jury and in its denial of a new trial or a remittitur of damages.

1. Jury Instructions

In making its argument that the Constitution requires the jury to be instructed on the necessity of limiting the amount of punitive awards to avoid intrusion on First Amendment freedoms, the Post-Gazette again relies heavily on the cautionary language of the Supreme Court in *Gertz, supra*. By transplanting the significance of that language from the argument behind limiting the availability of punitive damages to the argument here, however, the appellant is attempting to spend its constitutional currency in the wrong marketplace. Although much of what the court said about punitive damages in support of its holding in *Gertz* might appear relevant to a discussion on limiting amounts of punitive damages, that rhetoric cannot be proffered in support of a "constitutional" standard which is not related to the result achieved in that case.

In the punitive damages portion of the *Gertz* opinion, the Court first assessed the tension between the federal interest in free speech and the state interest in compensating for injury to reputation by noting that the

state interest "extends no further than compensation for actual injury," *Gertz,* 418 U.S. at 349, and does not include "securing for plaintiffs . . . gratuitous awards . . . far in excess of any actual injury." *Id.* With this, the Court was drawing a line between its prior discussion of *liability* with respect to a private plaintiff (compelling state interest allows recovery if liability is based on a finding of fault) and its pending discussion of *punitive damages.* The point was that the same analysis used with respect to liability need not be applied to the issue of punitive damages.

Having justified the different treatment between liability for compensatory damages and liability for punitive damages, the Court explained its concern about punitive damages by noting that juries, free to "assess punitive damages in wholly unpredictable amounts, . . . [might] use their discretion selectively to punish expressions of unpopular views . . . [and thereby] unnecessarily exacerbate[ ] the danger of media self-censorship. . . ." *Id.* at 350. To avoid this eventuality, that is, to ensure that jury awards of punitive damages do not unconstitutionally infringe on free speech, the Court held that such damages should only be available where the plaintiff has been able to prove actual malice by clear and convincing evidence. It did not attempt to engraft onto the constitutional analysis, either explicitly or implicitly, any additional requirement as to limitations on the amount of punitive damages which may be awarded once actual malice has been proven. The Court itself has observed: "Our concern in *Gertz* was that the threat of punitive damages, *if not limited to especially egregious cases,* might 'inhibit the vigorous exercise of First Amendment freedoms.' " *Smith v. Wade,* 461 U.S. 30, 50 (1983) (emphasis added). Thus, it was not any specific amount of punitive damages which threatened

First Amendment freedoms. It was the unfettered imposition of such damages which concerned the Court, and it responded to protect those interests by imposing the fullest measure of constitutional protection it has ever afforded speech in this context, proof of actual malice.

Our analysis of *Gertz* is aided by a review of the Court's decision in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), handed down three years earlier. Although the principal issue in *Rosenbloom* was whether the actual malice standard should apply to the defamation of a private plaintiff on a matter of public concern (plurality said yes), two of the dissenting justices also discussed the proper standard for allowing punitive damages. Justice Harlan argued that, in a private plaintiff defamation case, the constitution is adequately protected where punitive damages are available only when "express malice" is shown, and the jury has been instructed that the amount of any award of punitive damages must "bear a reasonable and purposeful relationship to the actual harm done." *Id.* at 77 (Harlan, J., dissenting). Justice Marshall, expressing his own concern that jury discretion in making large punitive damage awards threatened free speech, would have "restrict[ed] damages to actual losses," and not allowed punitive damages. *Id.* at 86 (Marshall, J., dissenting).

Thus, when the Court sought a majority position on similar issues in *Gertz*, it had these two blueprints before it on how to control the threat of punitive damages to constitutionally established rights. Although the *Gertz* majority borrowed extensively from the language of Justice Harlan's and Justice Marshall's dissents, it resolved the issue by rejecting their diametric plans and choosing an intermediate position. This position increased the ante on liability for punitive damages from

Justice Harlan's position, but set no limits on amount, and lowered the threshold from Justice Marshall's position of no punitive damages to make it possible to recover such damages in the proper case.

Therefore, when the trial court correctly instructed the jury concerning the requirement for proof of actual malice in its charge on liability, *see* Section IB, *supra*, it also discharged its obligation to the Constitution on the questions of the availability of punitive damages, *see* Section III A, *supra*, and on the amount of such damages which may be awarded. The Post-Gazette's proposed points for charge on this issue were all drawn from the explanatory language of *Gertz*, and therefore were properly refused.[25]

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[25] The specific instructions which the appellant asserts it was error to deny read as follows:

> The law has: "no substantial interest in securing for plaintiffs such as [the instant plaintiffs] gratuitous awards of money damages far in excess of any actual injury." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 at 349 (1974);

and

> Keep in mind that in considering an award of damages in this case, you are also faced with a balancing of values which are important in our society. On the one hand, the law has an interest in compensating plaintiffs for actual injury done to them by the wrongful, and non-privileged act of the Press. However, on the other hand, in arriving at an award of damages, you must be careful not to go beyond fair compensation for the actual injury caused to the plaintiffs, since to do so would pose a threat to the legitimate interest of freedom of speech and of the press which are protected by the Constitution. *Gertz v. Robert Welch, Inc., supra;*

and

> Finally, in considering whether or not to award punitive damages, as well as the amount of any award, you must again be mindful of the balancing of values which is important in a case such as this. You are permitted to award punitive damages in accordance with the standards which I have given you. On

(Footnote continued on following page.)

The Post-Gazette also urges that it is entitled to a new trial on damages, or a remittitur, because the trial court improperly charged the jury under Pennsylvania law. However, upon review of the trial record, we find that any challenge to the jury instructions on this basis is either without support in the law, or was waived. The two aspects of the court's charge which the appellant cites as inadequate include the failure to admonish the jury not to award excessive damages and the failure to instruct that any punitive award must bear a reasonable resemblance to the compensatory award.

On the first aspect, there can be no doubt that an award of punitive damages which is so excessive as to be an error of law will not be allowed to stand in this Commonwealth. *Daley v. John Wanamaker, Inc.*, 317 Pa. Super. 348, 353-354, 464 A.2d 355, 358 (1983). However, it is equally well settled that "the jury fixes the amount of such damages . . . without yardstick, subject only to reduction by the court if deemed excessive under the circumstances of the particular case." *International*

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> the other hand, you must not award punitive damages unless you are certain that the appropriate legal standards have been met, and must be careful that the amount of any such award is not excessive in the light of the factors which are appropriate for your consideration. This is because imposing punitive damages in an improper case, or imposing excessive damages upon a defendant in a proper case, would pose a threat to the legitimate interests of freedom of speech and of the press which are protected by our Federal Constitution. *Gertz v. Robert Welch, Inc., supra.*

Brief for Appellant at 40-41. Clearly, such instructions could as easily have been denied for their form as for their substance. As it has been noted about a jury instruction, " '[a]t its best, it is simple, rugged communication from a trial judge to a jury of ordinary people. . . .' " *Rosenbloom*, 403 U.S. at 85 n.9 (Marshall, J., dissenting). Justice Marshall appended this footnote to his discussion of Justice Harlan's suggestion that jurors be instructed to consider the broader impact of punitive damages and to relate them to actual injury.

Electronics Co. v. N.S.T. Metal Products Co., Inc., 370 Pa. 213, 225, 88 A.2d 40, 46 (1952); *see also, Rhoads v. Heberling*, 306 Pa. Super. 35, 45, 451 A.2d 1378, 1383 (1982). Thus, the issue of excessiveness of a punitive damage award is not to be put to the jury in the form of an instruction; rather, it is reserved for the trial court, in the first instance, and the appellate court on review. Therefore, the trial court committed no error when it refused to charge the jury that any punitive damages it might award must not be excessive.

As to whether the punitive damages must bear a reasonable relationship to the awarded compensation,[26] we acknowledge that this is the law in Pennsylvania. *See Kirkbride v. Lisbon Contractors, Inc.*, 357 Pa. Super. 322, 6516 A.2d 1 (1986) (en banc) (extensively addressing the question and concluding that, in spite of prior inconsistent precedent, a reasonable relationship must be required).[27] However, we are estopped from

[26] In its reply brief, the Post-Gazette also asserts that it challenged the disproportionality of the punitive damages with respect to the evidence of actual injury. Reply Brief for Appellant at 22. In support of this contention, the appellant cites *Walder v. Lobel*, 339 Pa. Super. 203, 211, 488 A.2d 622, 626 (1985) (the "verdict [must] bear[ ] a reasonable resemblance to the damages proven"). To the extent that the Post-Gazette intended this to raise a separate issue from that of disproportionality with respect to the compensation awarded, we find it was waived for the same reasons we are about to discuss. However, we also note that the language relied upon from *Walder* was used in the context of compensatory damages and does not stand for the proposition that punitive damages must not be disproportionate to the proof of actual injury. This is evident from the fact that the *Walder* court relied on *Mohler v. Warley*, 179 Pa. Super. 56, 116 A.2d 342 (1955), which did not involve punitive damages.

[27] While the law appears settled on this issue, it should be noted that the Pennsylvania Supreme Court Committee for Proposed Standard Jury Instructions has taken the opposite position, believing it is time to "depart[ ] . . . from what may be considered as the existing

(Footnote continued on following page.)

considering this alleged error in light of the appellant's failure to preserve the question for our consideration under Pa.R.C.P. 227.1(b). *See* Section II, *supra.* Nowhere in the appellant's proposed points for charge, its supplemental proposed points for charge, or its second supplemental points for charge did the Post-Gazette request the trial court to instruct the jury that any punitive damages must be reasonably related to the compensatory damages.[28] Also, after the trial court charged the jury that "[t]he amount you assess as punitive damages need not bear any relation to the amount you choose to award as compensatory damages," R.R. at 1746a, the appellant did not object.

Therefore, the error must now be deemed waived, for, as we observed in *Sulecki v. Southeast National Bank,* 358 Pa. Super. 132, 516 A.2d 1217 (1986), the appellant's

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Pennsylvania law on punitive damages." Pennsylvania Suggested Standard Jury Instruction (Civil) §14.02, Subcommittee Note at 3 (1984). This is also the view of the Restatement (Second) of Torts §908 (1979), and comment c thereto. Our supreme court has not expressly addressed its Committee's proposed jury instruction, although, in *Martin v. Johns-Manville Corp.,* 508 Pa. 154, 173, 494 A.2d 1088, 1098 (1985) (Per Hutchinson, J., with one Justice concurring and four Justices concurring in the result), the reasonable relationship rule was noted as a restriction on the imposition of punitive damages.

[28] Proposed charge number 66 does draw from *Laniecki v. Polish Army Veterans Association,* 331 Pa. Super. 413, 423, 480 A.2d 1101, 1106 (1984) to the effect that "a claim 'for punitive damages cannot stand on its own . . . "and you may not make any award of punitive damages" where actual damages have not been suffered by the [plaintiffs] . . . .' " R.R. at 1814a. However, this request refused by the trial court, does not meet the requirements of Rule 227.1(b) in that it raises an issue substantially different from that raised here. In addition, because compensatory damages were awarded, the appellant cannot now claim that it was prejudiced by the trial court's failure to give this charge.

failure to object at the time the charge was given means that "[it] agreed to the court's instruction . . . and . . . will not now be allowed to complain that the jury followed the instructions of the trial court." *Id.* at 137, 516 A.2d at 1220. *Sulecki* also teaches that where review of the "reasonable relationship" charge has been waived, the appellant may not then assert the disproportionality of the punitive and compensatory awards as part of its argument that the punitive damages are excessive. *Id.* ("No matter what language it chooses to express itself, defendant cannot alter the fact that it has waived this issue and we will not consider it.")

2. *Excessiveness of the Award*

Thus, we are left with the Post-Gazette's argument that the trial court erred in failing to grant a new trial or to remit the damages where the punitive damage award was excessive in light of the evidence produced at trial. In *Delahanty v. First National Bank, supra,* we found it to be well settled that "the decision of whether to award punitive damages and the amount to be awarded are within the discretion of the factfinder . . . [such that, a]lthough . . . not a favorite of the law, . . . they will only be reduced on appeal if the reviewing court determines that they are excessive under the facts of the individual case." *Delahanty,* 318 Pa. Super. at 129, 464 A.2d at 1263 (citations omitted). In *Walder v. Lobel, supra,* we added that "the jury's award of punitive damages should not be disturbed by the court 'unless it is so grossly excessive as to offend the conscience of the court and to shock its sense of justice.' " *Walder,* 339 Pa. Super. at 211, 488 A.2d at 626 (citation omitted). Excessiveness may be indicated when the award of these damages is "so large as to indicate that the jury was influenced by passion or prejudice," *Feld v. Merriam,* 314 Pa. Super.

414, 437, 461 A.2d 225, 237 (1983), *rev'd on other grounds*, 506 Pa. 383, 485 A.2d 742 (1985), or when it " 'clearly appears that the amount awarded resulted from caprice, prejudice, partiality, corruption or some other improper influence.' " *Walder*, 339 Pa. Super. at 211, 488 A.2d at 626 (citation omitted).

In deciding whether the trial court erred in refusing to grant a new trial or to remit damages on the ground of excessiveness, we observe that the decision "is peculiarly within the discretion of the trial court, and will not be interfered with on appeal unless the record discloses a clear abuse thereof." *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 472-473, 273 A.2d 899, 919 (1971). In exercising this discretion, however, the trial court is not free to "declare an award excessive simply because it might have awarded a lesser amount sitting in place of the jury." *Sulecki*, 358 Pa. Super. at 138, 516 A.2d at 1220. Similarly, we may not find an abuse of discretion on the part of the trial judge simply because we would have awarded a different amount. *Walder*, 339 Pa. Super. at 212, 488 A.2d at 627 (trial court's abuse of discretion not just an error of judgment).

The trial court charged the jury that in fixing the amount of punitive damages it chooses to award, if any, it

> may consider any and all of the following factors: The character of the Defendant's acts, the nature and extent of the harm to the Plaintiff which the Defendant caused or intended to cause, the wealth of the Defendant insofar as it is relevant in fixing an amount which will punish it and deter it and others from similar conduct in the future. . . . The amount of punitive damages awarded must not be the result of passion or prejudice against the Defendant on the part of the Jury. The sole purpose of punitive

> damages and the only purpose for which you may make an award and set an award of punitive damages is to punish the Defendant's outrageous conduct and to deter the Defendant and others from the commission of similar acts.

R.R. at 1745a-1746a (the omitted material concerned the "reasonable relationship" portion of the charge discussed *supra*). This charge, drawn from the Pennsylvania Suggested Standard Jury Instruction (Civil) §14.02 (1984), extracts those portions relevant to the instant action. Although the suggested instruction remains unadopted by our supreme court, *see Kirkbride*, 357 Pa. Super. at 325, 516 A.2d at 3, the elements included in the trial court's tailored charge are undisputedly consistent with our caselaw. *See Feld v. Merriam*, 506 Pa. at 395, 485 A.2d at 748 (look to the act and all circumstances, including motive and relations between the parties); *Pierce v. Pennman*, 357 Pa. Super. 225, 237, 515 A.2d 948, 954 (1986) *allocatur denied*, _____ Pa. _____, 529 A.2d 1082 (1987) (jury has broad discretion in assessing amount of punitive damages to effectuate punitive and deterrent function); *Sulecki*, 358 Pa. Super. at 138, 516 A.2d at 1220 (look to nature of conduct and purpose of award); *Dean Witter Reynolds, Inc. v. Genteel*, 346 Pa. Super. 336, 347, 499 A.2d 637, 642 (1985) *allocatur denied*, _____ Pa. _____, 523 A.2d 346 (1987) (quoting with approval Section 908(2) of the Restatement, which is the basis for the charge given); *Hoffman v. Memorial Osteopathic Hospital*, 342 Pa. Super. 375, 385, 492 A.2d 1382, 1388 (1985) (defendant's wealth is relevant to set punitive damages). Having correctly charged the jury, we now look to see whether the trial judge abused his discretion in upholding the jury award of punitive damages.

We conclude that Judge Mihalich's thorough analysis of this issue reveals sufficient grounds in all of the above stated categories to require an affirmance of the award in light of the standard of review stated above. In making this determination, we are mindful that, before even considering this issue, the jury had already determined that the published material was false, and that the Post-Gazette published it with actual malice and with at least a reckless indifference to the rights of Richard DiSalle.

In his opinion, the trial judge considered the nature of the newspaper's conduct and its apparent motive by observing that

> the Defendant's actions evidenced a particular disregard for its responsibilities as a major news gathering and conveying source. Far from attempting to report dispassionately on a dispute which had ripened into a protract[ed] legal proceeding, the purpose of the *Post-Gazette* was to sensationalize this bitter family controversy by lurid suggestions of fraud and sexual impropriety by a man whose reputation was above reproach. It is not simply that the article prepared by the *Post-Gazette* was replete with inaccuracies; it was more that the editors in charge of the preparation of the article found it necessary to insert an unfounded and sensational element to fill a "hole" in the story. Rather than reporting accurately that this "hole" was not even of prime consideration to counsel for the contestants, the *Post-Gazette* highlighted it in such a way as to leave the natural impression on the part of the reader that a serious question of Mr. DiSalle's competence and integrity had been entertained in a court of law.

Trial Court Opinion at 30-31.

From our own review of the record, we find that these conclusions are amply supported by the evidence, and we agree with the significance attributed to this conduct. In

Frisk v. News Co., supra, it was determined that evidence of an "extreme departure from acceptable journalistic practices" may form the basis for an award of punitive damages. *Frisk*, 361 Pa. Super. at 549, 523 A.2d at 353. Conversely, in *Sulecki, supra*, this court upheld a trial court's remittitur of an award of punitive damages against the Bank on the grounds that the defamation was the result of the personal hostility of one of the Bank's employees acting on his own, although within the scope of his employment. Adopting the reasoning of the trial court, we held the reduction proper in light of the isolated conduct of the employee. *Sulecki*, 358 Pa. Super. at 139, 516 A.2d at 1221. *See also, Dean Witter, supra* at 348, 499 A.2d at 643 (award upheld where punitive damages imposed based on conduct of more than just a single agent). Instantly, the trial judge noted the combined efforts of the Post-Gazette's editorial staff to fill a "hole" in the story, not just one employee acting on a personal grudge. There being ample evidence in the record to support this, we do not find that the trial judge abused his discretion in upholding the punitive damages awarded by the jury.

As to the circumstances surrounding the publication of the article, the trial judge noted:

> This article was not the report of a fast-breaking news story in which time for reflection and thought on the part of the newspaper was out-weighed by the need to quickly and properly report the essence of the facts to the public. This article had been prepared over a substantial period of time and the selection of the material to be placed in the article was done with discretion and premeditation by the officials of the newspaper.

Trial Court Opinion at 34. Again, we find this conclusion consistent with the evidence adduced at trial and logically related to the jury award, and therefore cannot say that the trial court abused its discretion.

Finally, the trial court considered the evidence presented at trial tending to show the wealth of the Post-Gazette and its ability to pay an award of punitive damages, and the extent of the harm caused to DiSalle as a result of the defamatory publication. Although there was no evidence available relating the precise "book" value of the Post-Gazette at the time of trial, the testimony of one of the newspaper's financial officers made it evident that the award of $2,000,000.00 in punitive damages, albeit large, was not so large as to suggest that the jury was motivated by either passion or prejudice. Rather, in light of all that has been discussed, it is apparent that the jury was reacting to the grossly cavalier attitude toward the sensitivities and reputation of a prominent member of the community by a major publishing force in the region.

The jury responded to the court's charge that the only purpose for awarding punitive damages is to punish and deter by setting an amount equal to that goal. The feeling which produced this jury award was an anger appropriate to the Post-Gazette's callousness, and, as this attitude was amply proven in the courtroom, we do not find that the trial judge abused his discretion in letting it stand.

IV
CONCLUSION

With this appeal, the Post-Gazette asks us to strike an unprecedented balance between two long-standing traditions which, for most of our history, traveled parallel courses without conflict. Our constitutional tradition of jealously guaranteeing free speech was not seen to overlap with the even older tradition of protecting a man's honor and reputation from false

comment because defamation was considered unworthy of constitutional protection; it was false by definition and therefore of no value to a form of government dependant on the free exchange of information.

Recently, the Supreme Court recognized that the essence of our national commitment to free speech is the principal that public debate must be allowed to be uninhibited and robust, even vehement and sometimes unpleasantly sharp and, because erroneous statements are inevitable in such a setting, even they must be protected to give free expression the breathing space it needs to survive. Therefore, the definition of false speech was refined in order to better protect free speech. The line separating protected false speech from that false speech which would remain outside the constitutional pale was drawn between the speaker who knew or recklessly disregarded the fact that the speech was false, and the one who misspoke without this new "actual malice." The former was left to the mercies of state defamation law while the latter was shrouded with the cloak of the First Amendment and protected from the assessment of damages for his injurious misstatement.

Actual malice became the Supreme Court's defamation cursor, to be placed on the screen before it at the point where the interests sought to be protected by the First Amendment take precedence over the individual interests embodied in state defamation law. Thus public officials and public figures find themselves separated from recovery in defamation by the cursor, but private plaintiffs do not. While the position of the cursor has not been static, the degree of protection which follows it has remained virtually unchanged over the score of years which have passed since its adoption and the many score of cases which have called for its application.

The Post-Gazette seeks to enlarge, rather than relocate, this protection by making knowledge or reckless disregard of falsity irrelevant to the issue of liability, and actual knowledge of falsity a prerequisite to the recovery of punitive damages. This we will not do under the circumstances presented here. Actual malice, though not without its detractors, has served its purpose by according protection only to those who do not publish with knowledge of or intentional blindness to the truth, and therefore whose actions serve the objectives of robust debate. All others, who act in disregard for the truth and therefore contribute nothing, are properly forced to take their chances in the same free marketplace of ideas which they have sought to abuse. The facts of this case do not recommend to us the need to lessen the risks taken by the latter category of defendants.

DISSENTING STATEMENT BY MONTGOMERY, J.

APPENDIX

FEUD HEATS IN FAMILY'S BATTLE FOR $8 MILLION INHERITANCE

By THOMAS J. PORTER, JR.
Post-Gazette Staff Writer

Paul Ciaffoni, a Washington County self-made man who amassed a fortune in real estate, died at the age of 79 in 1974. But since then the sweet wine of success that his family enjoyed has turned sour.

For five years, the family has been bitterly divided over disposition of Ciaffoni's $8 million worth of assets. Allegations of fraud abound.

On one side is the widow, Concetta, now residing in Tucson, Ariz; his youngest son, Robert of Canonsburg, Washington County; the oldest son, Orlando of Brentwood, the oldest daughter, Margaret Soviero of Peters Township, Washington County, and their children.

On the other side are four daughters, Elizabeth Cowden of Cecil Township, Washington County; Virginia Messa of Philadelphia; Pauline Myers of New Jersey; Lorrayne Erikson of Birmingham, Ala.; and their children.

So bitter has been the fight among them that some members of the family won't accept the riches to which they are entitled until the situation is resolved.

That resolution has been the subject of lengthy court disputes, involving a Commonwealth Court judge, a U.S. District judge and famed Philadelphia lawyer Richard Sprague.

It is a situation Ciaffoni could never have imagined occurring when he packed up his few belongings at the advent of World War I and left his native Italy to seek his fortune in the United States. He settled in Washington County and eventually, through years of hard work and shrewd business dealings, became a property owner of considerable means.

In happier times, the family worked together under the leadership of the husky patriarch.

But at his death the harmony ended over the estate that includes thousands of acres of rolling farmlands, hundreds of head of cattle, oil, gas and coal, real estate in seven states, and a chain of leased supermarket buildings.

A chief contestant of the will and a co-executor, Robert Ciaffoni, charges that the gut issue of the family feud centers on fraud:

"We're not arguing acreage. This will is a fraud. It is not my father's will. It is not in keeping with my father's policy of keeping peace in the family," he said.

Robert and his mother, who together would gain the most from the will, are the primary contestants, and have taken the side of Mrs. Soviero, who would receive nothing.

"I renounce this will as a matter of honor. We were once a happy family. This fraud has ripped out the moral and financial heart of my family," Robert declared.

He charges that the will was falsified to the benefit of his youngest sister, Elizabeth Cowden, and in a request for an injunction filed in the Washington County courthouse, he names as co-conspirators her and Commonwealth Court Judge Richard DiSalle who prepared the will in 1968 as an attorney.

The injunction request asks that Mrs. Cowden not be permitted to "exercise the rights of and powers of a co-executor of the family fortune" because as a co-conspirator in a fraud she could "invite recrimination against those who have charged her with fraud."

In February, visiting Judge Earl F. Keim of Westmoreland County who heard the case in Washington County, upheld the authenticity of the will and ruled as inadmissible claims by experts hired by the contestants that portions of the will were altered.

Keim, however, reserved the right to change his decision pending the filing of briefs by attorneys for each side. Those briefs have now been filed and Keim is expected to make a final ruling soon.

The opponents of the will have vowed to take the case to the state Supreme Court if they lose.

The will provides Mrs. Cowden with the family's 400-acre homestead and the estate's largest food store on West Liberty Avenue, Brookline Junction, with an estimated monthly rental value of $6,000.

She did not receive the homestead or the food store, which was an A&P supermarket in Brookline Junction, in a 1965 will that the proponents claim is their father's real will.

However, she did receive several valuable tracts of land and an A&P store in Sewickley.

"She was well provided for in my father's real will," Robert said. "At that time we had a great amount of respect and love for Elizabeth. She was the baby of the family."

"But, it was always my father's intention to have the family homestead and lands close in to remain in the Ciaffoni name. He wanted his name to live on in this area after his death. That's the way he was."

Robert said the family homestead, purchased in the 1930s was the "roots and moral substance of the Ciaffoni family."

"It's where the grandchildren came to stay in the summer, Christmas and other family gatherings. We worked that land with our hearts and hands. We plowed it, made hay on it, and raised thousands of head of cattle," he said.

"My father would never have let it go out of the family to someone Elizabeth married."

Robert cites a U.S. Postal Service inspector's report, entered in evidence at an earlier hearing last year, that the will's controversial second page "appeared inconsistent" with the other pages.

The examination of the will was ordered by Washington County Judge Paul Simmon, who dismissed himself from the case when nominated to a U.S. District Court judgeship, but was limited to a "survey and review of superficial physicial aspects."

The state Supreme Court then appointed Keim to the case and a trial was held last September.

In a subsequent brief filed by J. Brook Aker, the attorney representing the widow's side of the family, he claimed that the court erred in not permitting testimony of experts hired by the opponents proving the will is a fraud.

Robert said the portion of the will assigning Elizabeth the Brookline Junction property was referred to as Pittsburgh 19 and charges that if DiSalle prepared the

will, as he testified he did, he would have known that Pittsburgh 19 is in the Uptown—"the legal hub of Allegheny County."

Robert further charges that for security reasons Richard DiSalle never let an inside page of a will begin or end with a sentence or paragraph. Yet two pages in the questioned will did.

When questioned on this point during a recent interview, DiSalle, who this spring lost a primary election bid for renomination, said:

"I can't comment. The case is under appeal."

Robert also said pages before and after the page leaving Elizabeth her legacy where doctored to permit the new entry.

"It's as if someone were trying to meet some sort of internal deadline to get something else in," Robert said.

He said that when DiSalle prepared the will DiSalle and Elizabeth were close friends.

In a deposition prepared by Richard Sprague, attorney for proponents of the will, and entered in the court record of the case, Sprague questioned Robert about the relationship between DiSalle and his sister Elizabeth.

Sprague asked Robert in the deposition:

"Now you tell me what has been told to you by other people which to you is an indication of sexual intimacy between Richard DiSalle and Elizabeth Cowden?"

Robert replied.

"I'm sorry, your misstating my position. I said they were by themselves for extended periods of time and were observed by other people and that it could develop into that. That's all I am telling you."

When contacted, Mrs. Cowden declined to comment on any aspect of the case, referring all questions to her attorney, Robert Ceisler.

Ceisler said, "I don't think this is the appropriate time to discuss this case. Briefs have been filed by both sides and we are awaiting the decision from Judge Keim."

In another deposition taken by Sprague, he questioned the widow, Concetta, about a conversation she had with her husband shortly before his death in which she asked her husband if he knew that Elizabeth was getting the family homestead and the Brookline Junction property.

According to the deposition, Ciaffoni's reply to his wife was:

"No, sir. I did not sign. Call her right now."

She said he then "screamed at me. I thought he was going to take a heart attack.

"I said, 'No, you wait till you get better,' and he quieted down and that was the conversation we had.

"That's when I wanted specifically—I felt that he did not know, cause he couldn't see or hear to good."

The questioned will leaves nothing to the older daughter, Margaret Soviero.

Mrs. Soviero, a widow, with three college age children, is director of the Reading Academy of the Community College of Allegheny County and is working on her doctorate degree.

In the 1965 will she received approximately 500 acres in North Fayette Township near Greater Pittsburgh Airport. That property now goes to two sons of a younger sister, Virginia Messa.

She admitted that there were bad feelings between her and Virginia and that Elizabeth sided with Virginia.

"Being the oldest sister in a large family and having to dispense punishment to younger sisters in the absence of my mother and father at times wasn't a job I relished anymore than they did," Mrs. Soviero said. "But the worse thing I ever remembered doing was hitting Elizabeth over the head with a spaghetti fork.

"This cannot be my father's will. He would not have done this to me. It would have been an unnatural thing for him to do."

Robert claims Elizabeth has been instructed by her attorney not to speak to her mother.

"My mother is very hurt," Robert said.

Meanwhile the two sides of the family remain estranged.

"I can't speak for everyone," Robert said. "But the family will never be the same. Personally, I no longer speak or have anything to do with the other side.

"I tried to make peace once through my sister Lorrayne in Alabama and after a 4-hour phone conversation she told me, 'I know it's not Daddy's will, but you prove it.' We were once an open family with nothing to hide from each other .... Our energies have been wasted on this thing."

DISSENTING STATEMENT FILED JUNE 15, 1988

IN THE SUPERIOR COURT
OF PENNSYLVANIA

No. 00080 Pittsburgh, 1987

RICHARD DISALLE AND JOAN DISALLE,
HIS WIFE,

Appellees,

v.

P.G. PUBLISHING COMPANY, T/A
THE PITTSBURGH POST-GAZETTE,
A CORPORATION,

Appellant.

Appeal From the Judgment Entered December 17, 1986 in the Court of Common Pleas of Washington County, Civil Division, at No. 367 September Term, 1979

BEFORE: CIRILLO, P.J., JOHNSON AND MONTGOMERY, JJ.

FILED: JUNE 15, 1988

DISSENTING STATEMENT BY MONTGOMERY, J.:

I respectfully dissent, solely upon the issue of excessiveness of the $2 million punitive damage award which was upheld by the Majority in this case. This award, in my view, shocks the conscience, and should not be affirmed.

Punitive damage awards may be reduced by a trial judge, or may be reduced on appeal if the reviewing court determines that they are excessive under the facts of the individual case. See *Delehanty v. First Pennsylvania Bank, N.A.*, 318 Pa. Super. 90, 464 A.2d 1243 (1983). However, I would prefer to grant a new trial in circumstances such as those presented in this case because I am convinced that due process is offended unless the issues of compensatory and punitive damages are presented to the jury in a bifurcated manner. The jury should first deliberate the issue of what compensatory damages, if any, are to be awarded to the plaintiff. Only after the verdict has been rendered on that issue should the jury be permitted to consider the question of punitive damages.

Justice O'Connor has articulated well several concerns I share regarding a denial of due process in a punitive damage procedure such as that followed in the courts of our Commonwealth, in which there are no real limits or structure. See Justice O'Connor's recent Concurring Opinion on this issue, in *Bankers Life and Casualty Company v. Crenshaw,* _____ U.S. _____, _____ S. Ct. _____, _____ L. Ed. 2d _____ (56 U.S.L.W. 4418, decided May 16, 1988). The bifurcation of the compensatory and punitive damage stages of a case, in my opinion, is one essential requirement to avoid offending due process standards. Such a bifurcated procedure is followed in other jurisdictions. See the excellent study and commentary on this point, and on punitive damage procedure generally, in Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedure,* 69 Va. L. Rev. 269 (1983).

I believe that the compensatory damages which were awarded in this case were clearly affected by the presentation of evidence of the wealth of the Defendant, in connection with the jury's consideration of the punitive damage issue at the same time. On this point, see *Feld v. Merriam,* 506 Pa. 383, 485 A.2d 742 (1984). Thus, a retrial of the compensatory damage issue is warranted. This result could have been avoided by a bifurcation procedure, such as that followed in other jurisdictions. I urge the adoption of such a practice in our Commonwealth.

Opinion and Order of the Court of Common Pleas of Washington County, Pennsylvania Dated December 12, 1986

IN THE COURT OF COMMON PLEAS
OF WASHINGTON COUNTY, PENNSYLVANIA

CIVIL ACTION LAW

No. 367 September Term, 1979

RICHARD DISALLE and JOAN DISALLE,
his wife,

Plaintiffs,

vs.

P. G. PUBLISHING COMPANY, t/a
THE PITTSBURGH POST-GAZETTE,
a corporation,

Defendant.

OPINION

Despite its many historical antecedents in the common law and the proliferation of opinions from the United States Supreme Court defining its constitutional perameters, the law of defamation remains a dark and foreboding conundrum. It represents the valiant but imperfect attempt of the law to reconcile a two-hundred-year-old American tradition of placing speech as a pre-

emminent freedom with an even older tradition of recognizing that an attack on a man's honor and reputation is an attack on the soul of the man himself.[1]

In reviewing the many cases under the law of defamation decided in the past several decades, the Court concludes that no two cases in this area of the civil law are ever exactly alike. Systematic consideration of each case is thus important so that a path through this conundrum may be discerned, giving due regard to the great principles which clash within it.

Clashing in the present case are also entities of considerable standing. On the one hand, the Plaintiff is Richard DiSalle, an individual whose life is a monument to the best traditions of the American work ethic. The exercise of that work ethic produced for him a multi-layered reputation for competence, honesty, and integrity. The depth and value of that reputation was not seriously challenged by the parties in this action.

DiSalle's antagonist here is the P.G. Publishing Company, the publishers of the *Pittsburgh Post Gazette.* The *Post Gazette* is a major publishing force in Western

[1] The glorifications of honor and reputation are replete throughout recorded history. In the first century b.c., Publilius Syrus recorded that "a good reputation is more valuable than money". Shakespearan tragedy catalogs these feelings as well:

> "Reputation, reputation, reputation, oh, I have lost my reputation. I have lost the immortal part of myself, and what remains is bestial."
>
> *Othello,* Act 2, Scene 3, Line 362.
>
> "I have offended reputation, a most unnoble swerving."
>
> *Anthony & Cleopatra,* Act 3, Scene 2, Line 49
>
> "Mine honor is mine life; both grow in one; take honor from me, and my life is done."
>
> *Richard II,* Act 1, Scene 1, Line 182

In his immortal *Don Quioxte* Miguel DeCervantes adds:

> "Mine honor is dearer to me than my life."
>
> Part 1, Book 4, Chapter 1, Page 226.

Pennsylvania with readership climbing to nearly 200,000 on a daily basis. The *Post Gazette* is also a respectable publication which has served the Western Pennsylvania community for many years.

On September 10, 1979, the *Post Gazette* published an article entitled "Feud Heats In Family's Battle For $8 Million Inheritance". The five column article chronicled a bitter dispute in the family of the late Paul Ciaffoni over a 1968 will prepared for Mr. Ciaffoni by Richard DiSalle before DiSalle's elevation to the Bench. The article, which was admitted as Exhibit 1 in the case, attempts in part to summarize extended legal proceedings which had occurred before Judge Keim in Washington County approximately six months before the article was published in which the validity of the will was ultimately upheld. It was heavily written from the perspective of Robert Ciaffoni, a disgruntled heir, who, (along with certain other members of the family) had challenged the validity of the will.

In the context of this challenge, Richard DiSalle was identified by Robert Ciaffoni as a conspirator with Elizabeth Cowden (Ciaffoni's younger sister) in the making of a fraudulent will. Through a selected quotation from a deposition *not ultimately admitted* at the trial of the will contest, the article left the inference that DiSalle's motivation for becoming involved in so uncharacteristic an activity as the creation of a fraudulent will was his supposed meretritious relationship with Elizabeth Cowden.

It is plain to this Court, as evidently it was to the jury in this case, that these allegations against Richard DiSalle were totally false.

The publication of this article precipitated great concern and humiliation for Richard DiSalle, and ultimately resulted in the institution of this action for defamation against the P.G. Publishing Company. After a most extensive trial before this Court in April of 1985, the jury deliberated briefly before returning a verdict in favor of Richard DiSalle, awarding him $200,000.00 in compensatory damages and $2 million dollars in punitive damages. His wife, Joan DiSalle, received an award of $10,000.00 on a claim for loss of consortium.

Subsequent to the trial and the preparation of the voluminous transcript, the parties have supplied the Court with a virtual mountain of legal pleadings and precedential support.

The Court has now had the opportunity to consider with great care the positions of the parties in this matter and has determined that the jury's verdict will not be disturbed.

While the allegations of the Defendant in Support of Post-Trial Motions are many in number, the Court perceives that they may be grouped into a few large categories of issues. By far, the most extensive of these categories concerns the Court's instructions to the jury and the sufficiency of the evidence to support the jury's verdict. Rather than consider each element of the Defendant's arguments in a piece-meal fashion, the Court believes that a more logical presentation of this case can be accomplished by a review of both the facts and the law in a concurrent fashion, guided always by the established law of the Commonwealth and the United States respecting these issues. In the context of this discussion, the fundamental concerns of the Defendant will be addressed.

The Court is aware that in undertaking a review of a jury's verdict in a case of defamation, greater sensitivity is required than in other actions sounding in tort. The role of the Court here is to insure that the evidence was constitutionally sufficient to warrant the findings made by the jury and, while Pennsylvania courts have permitted the Court to continue to pass on a Motion for Judgment N.O.V. by considering the evidence and inferences in a light most favorable to the verdict winner, *Brophy vs. Philadelphia Newspapers, Inc.*, 422 A.2d 625, 632 Pa. Super. (1981); *Banas vs. Matthews International Corporation*, 502 A.2d 637, 642 Pa. Super (1985), the Supreme Court of the United States has noted that in a case such as this, an examination of the record as a whole must be undertaken to insure that the judgment does not constitute an undue intrusion into First Amendment freedoms. *New York Times vs. Sullivan* 376 U.S. 254, 285 (1964); *Bose Corporation vs. Consumers Union* 466 U.S. 485 (1984). This heightened judicial scrutiny is occasioned by the concern that the delicate weave of the law of libel is difficult enough to discern by lawyers and judges and presents the intelligent lay person with a most knotty riddle indeed. Moreover, the intense scrutiny required of a reviewing Court in cases such as this reflects that for juries a familiarity with the one great competing principle in this area of the law, (the concern for a person's reputation) is more commonly and passionately felt than the somewhat more esoteric concerns of First Amendment Jurisprudence. In any event, the Court adopts a most solicitous posture in the review which it will undertake.

To begin, a defamation is a communication which tends to harm the reputation of a person so as to lower him in the estimation of the community or deter or impede third persons from dealing with or associating

with him. *Baker vs. LaFayette College* 504 A.2d 247, (251 Pa. Super. 1986); *Steaks Unlimited Inc. vs. Deaner* 623 F.2d 264, 270 (3rd Cir. 1970). In the first instance, it is within the province of the Court to determine whether the communication is capable of defamatory intent, leaving to the jury the determination of whether the material was so interpreted by its recipients. *Baker supra.; Steaks Unlimited, Inc., supra.*

In the present case, the Court had little difficulty in determining that the communications made in Exhibit 1 were capable of defamatory intent. The article taken as a whole leaves a reasonable reader capable of determining that Richard DiSalle had been involved in a fraudulent conspiracy to forge a will of a client to the benefit of certain legatees and to the detriment of others. Further, the only suggestion as to why DiSalle would have become involved in so disreputable an act was the suggestion that he, a married man and father, was engaged in a relationship with Elizabeth Cowden which transcended all bounds of propriety.

Having made this threshhold determination (one which was not seriously disputed by the parties) the Court and the jury then had to consider whether the elements of a liable action under the laws of Pennsylvania and the United States had been properly made out. The Court set forth these elements in its charge to the jury at T.R. 1512-1513. The Court instructed the jury that before Richard DiSalle could recover on his claim of libel, he was required to prove:

1. That the *Post Gazette* had published the article of September 10, 1979;

2. That the article contained false and defamatory; matters about Richard DiSalle;

3. That the readers of the article understood the defamatory nature of the material and its application to DiSalle;

4. That, by clear and convincing evidence, the article was published by actual malice;

5. That the *Post Gazette* had abused and therefore lost its privilege of fair comment, and

6. That Richard DiSalle had suffered injury as a result of the publication.

These elements properly set forth the perameters of the claim of defamation under the law of Pennsylvania. *See, Marcone vs. Penthouse International* 754 F.2d 1072, 1077-1078 (3rd. Cir. 1985).

The Court may move rapidly through the first three elements of the Plaintiff's case. There is no dispute but that the *Post Gazette* published the article in question, and, as noted previously, the material contained therein regarding Richard DiSalle was capable of defamatory intent. Moreover, the Plaintiff produced a series of witnesses whose testimony established, among other things, that the article was read and understood in a way demeaning to the reputation of Richard DiSalle. (*See,* testimonies of Milton Rosenberg, T.R. 801, et seq., Walter Marm T.R. 836, et seq., Kenneth Yoblonsky T.R. 913, et seq., James Dean T.R. 927 et seq., Anthony Galletta T.R. 941 et seq.)

Moreover, we entirely agree with the statement of counsel for the Defendant in his brief in Support of the Post-Trial Motions (at Page 11) that the "Plaintiff made a substantial showing at trial that the allegations made by the will contestants were false, that there had never been a conspiracy, and that there was no intimate relationship between DiSalle and Elizabeth Cowden".

Not only did the Plaintiff himself strongly deny any such impropriety (T.R. 152 et seq.) but evidence from an expert document examiner showed that the will drafted by DiSalle was not the product of fraud or forgery. T.R. 348-350, 345-365.[2]

With respect to the allegations of infidelity, both the Plaintiff and Elizabeth Cowden dismissed these as frivolous. T.R. 175-176 and 719.

Indeed, it was pointed out that the will contestants themselves had never seriously put forth the allegation of sexual impropriety as a matter of dispute in the will contest proceedings in Washington County. T.R. 1193-1210. When DiSalle testified at those proceedings, the subject of this relationship was never raised. T.R. 157-158.

Moreover, a review of the testimonies of the representatives of the *Post Gazette* would reveal no serious contention on their part that either of the charges were based in objective fact. *See*, testimonies of Thomas Porter, David Warner, and William Deibler. Indeed, it appears to the Court that the position of the *Post Gazette* has been that the underlying truth of these allegations was not its primary concern; rather, the article was ultimately transformed into a piece which attempted to show the impact of a bitter will contest on the Ciaffoni family in a most dramatic way. T.R. 1217. As will be developed later, it is clear that little effort was made to independently determine whether either of the serious allegations made by Robert Ciaffoni and the other contestants were factual.

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[2] Reference was also made in the trial to the examination of the will by a United States Postal Inspector indicating as well that there was no significant evidence to challenge its authenticity. T.R. 668.

Of course, being satisfied that the Defendant had republished allegations of the contestants which were false and defamatory to Richard DiSalle hardly concludes the analysis. Indeed, this most preliminary showing only brings the matter to the threshhold of the two major legal obstacles between the Plaintiff and recovery: the proof of actual malice and the related application of the privilege of Fair Comment.

As a "public" figure, Richard DiSalle was precluded from recovering damages of any kind for defamation unless the publication of the false and defamatory material is made with actual malice, that is, "with knowledge that it was false or with reckless disregard of whether it was false or not". *New York Times vs. Sullivan* 376 U.S. at 280. In common parlance, the word "malice" connotes a sense of personal dislike or a vindictive spirit. This is not the essence of "actual malice" when used in the law of defamation. As we will see, the phrase "actual malice" is now a legal term of art referring to a state of knowledge on the part of the publisher as to the veracity of the material he disseminates.

The Supreme Court has candidly noted that the definition of "actual malice" (particularly that aspect of the standard which permits the Plaintiff to recover upon proof that the defamation "was published with reckless disregard of its truth), "cannot be encompassed in one infallible definition". *St. Amant vs. Thompson* 390 U.S. 727, 730 (1968). The standard of reckless disregard is not one which judges the actions of a reasonably prudent publisher, since such a standard would be akin to the lesser imposing challenge of the negligence rule. *Id.* at 731. To maintain a proper libel action, sufficient evidence must be introduced to permit the conclusion that the

publisher *in fact* entertained "serious doubts" as to the truth of his publication. *Id.* At a minimum, the Plaintiff must show that the publisher had serious doubts about the veracity of the allegations in his report, or had a subjective awareness of their probable falsity. *Gertz vs. Robert Welch Inc.* F.2d 527, 538 (7th Cir. 1982); *Garrison vs. Louisiana* 379 U.S. 64, 74 (1969). *Steaks Unlimited Inc. vs. Deaner* (623 F.2d 264, 275 (3rd Cir. 1980).[3]

In making this determination, it is clear that a jury may not find actual malice merely on the basis of a defendant's failure to adequately investigate a charge, or simply because the charge is denied by the person about whom it is made. *St. Amant, supra.* at 733; *Gertz, supra.* at 538; *Edwards vs. National Audobon Society* 556 F.2d 113, 121 (2nd Cir. 1977). Furthermore, while these elements may have some probative value in the determination, actual malice can not be found merely because of the carelessness or bad judgment of the publisher, or the falsity of the material disseminated. *Brophy supra.* at 633; *Marcone vs. Penthouse International supra.* at 1091.

However, it is equally clear that while the matter at issue is the subjective state of mind of the publisher with respect to the falsity of the material contained in the communication, a mere denial of knowledge of the falsity or a feigned profession of belief in its truth is insufficient to defeat a claim of actual malice. *St. Amant supra.* at 732; *Gertz, supra.* at 538; *Marcone, supra.* at

[3] The Pennsylvania Superior Court has characterized the test as well in terms of requiring proof that the defendant engaged in an *extreme* departure from the standards of investigating and reporting ordinarily adhered to by responsible publishers. *Brophy vs. Philadelphia Newspapers Inc.* 422 A.2d 625, 629 Pa. Super. (1981). This standard is far beyond the normal rendering of the negligence criteria.

1089. As in any case which involves proof of the subjective state of mind of the defendant, circumstantial evidence relating to objective factors within the knowledge of the defendant may be utilized by the trier of fact to infer a state of mind even over protests of the defendant to the contrary.

Courts have identified for us certain objective elements to consider in making this determination. In *St. Amant vs. Thompson supra.*, the Supreme Court noted that:

> "The Defendant in a defamation action brought by a public official can not ... automatically insure a favorable verdict by testifying that he published with the belief that the statements were true. *Id.* The finder of fact must determine whether the publication was indeed made in good faith".

St. Amant, at 732. In making that determination, the Supreme Court has noted that an absence of good faith could be detected where a story was fabricated by the defendant, represented the produce of his imagination, or was based upon some anonymous or otherwise unreliable information. *Id.* Additionally, the allegations themselves may be so inherently improbable that only a reckless publisher would circulate them. Furthermore, in the particular facts of a given case, there may be obvious reasons to doubt the veracity of the informant or the accuracy of his reports. *Id.* In all such cases, subjective awareness of probable or actual falsity may be inferred and actual malice made out.

The essence of the *St. Amant* analysis appears to be that certain proposed stories which come to the attention of a publisher carry with them "red flags" in a variety of guises which should warrant further review before they are put to press. Perhaps the most fundamental of these "red flags" is the reliability of the source of the

allegations themselves. Various cases cited to us by the parties illustrate this principle and are useful to illustrate the principle applicable in the facts of the present case.

The Defendant has repeatedly called our attention to *Time Inc. vs. Pape* 401 U.S. 279 (1979) and *Edwards vs. National Audobon Society* 556 F.2d 113 (2nd Cir. 1977). In *Time,* an action for libel was based upon a story in a national magazine reporting and synopsizing the findings of the United States Civil Rights Commission with respect to instances of police brutality across the country. *Time* had failed to use the word "alleged" in reporting on an incident involving the Plaintiff. In finding an absence of malice by *Time,* the Court stressed that the magazine's report was not the result of any independent investigation it had conducted, but was simply an attempt to fairly distill the meaning of an official report by a well regarded United States Government agency. *Id.* at 286-291. The Court noted that there is a significant difference between reporting what *someone did* as opposed to what *someone else said someone did. Id.* 286. In an exercise of a considerable understatement, the Court noted that "the question of truth of such an indirect newspaper report presents rather complicated problems". *Id.* After extended analysis, however, the Supreme Court was satisfied that the Civil Rights Commission Report itself was so structured that *Time* fairly discerned that the Commission believed the truth of the allegation in its official rendering and that the *Time* synopsis of the report was thus fair. *Id.* at 286-289. At most, *Time* was guilty of an error in its interpretation, but the First Amendment leaves room for honest error to maintain a free flow of information, particularly about the workings and findings of a government commission. *Id.* 291.

The publisher in the *Edwards* case, while not having an official government report to rely on, nonetheless was found to have quoted accurately from an organization of equally reputable standing, the National Audobon Society. In absolving the newspaper from liability, the Court stated that "... when a responsible, prominent organization like the National Audobon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity". *Id.* at 120. It is only when a publisher independently espouses those charges or deliberately distorts them for his own purposes of attack that a problem would arise. *Id.* The article in the *Edwards* case was, however, "the exemplar of fair and dispassionate reporting of an unfortunate but newsworthy contretempts".[4] *Id.*

Where the issue is whether the Defendant published the defamatory material with knowledge of its falsity or with serious subjective doubts in that regard, a fundamental consideration must accordingly be given to the source of the allegations which are alleged to be tortious. Where, as in *Time Inc.* and *Edwards,* the sources are official governmental records or the report of a renowned private institution, the publisher may justifiably rely on the materials contained therein and must only insure that the re-publication fairly and reasonably distills that which was contained in the original report. Such sources do not raise the "red flags"

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[4] Certainly, cases like *Time Inc.* and *Edwards* infuse into the Constitutional standard of actual malice considerations very familiar in the discussion of the common law Fair Report or Fair Comment Privilege. Indeed, some courts have suggested that the Fair Report Privilege itself has somewhat of a constitutional dimension. *See,* discussion in *Medico vs. Time Inc.* 643 F.2d 134, 143 (3rd Cir. 1981).

which the *St. Amant* Court identified, and, unless a plaintiff can prove more particular subjective knowledge on part of the publisher's that such otherwise credible sources are not to be believed, actual malice is not readily inferrable.[5]

The Plaintiff has cited for our review the case of *Gertz vs. Robert Welch Inc.* 680 F.2d 527 (7th Cir. 1982). This case chronicles the re-trial of a libel action originally considered by the United States Supreme Court in *Gertz vs. Robert Welch Inc.* 418 U.S. 323 (1974). On remand and re-trial, the Plaintiff, an attorney who had been accused by the Defendant of having affiliations with the Communist party, was awarded compensatory and punitive damages. The Defendant had raised claims of Constitutional and common law privileges and claimed that the article was a fair distillation of material contained in published Congressional reports. The Court of Appeals initially had difficulty in applying this privilege precisely, since the article regarding Gertz was not a contemporary report on the proceedings from which the accusations were allegedly drawn and the focus of the article was really on a situation quite different from those proceedings. *Id.* at 536. Where the

[5] While this matter will be discussed in some more detail later in the opinion, it is useful to point out at this time a distinction which exists between a determination of actual malice and a determination that a publisher abused the Fair Report Privilege. In reporting faithfully and accurately on either a government report or a courtroom proceeding, a newspaper may not only publish false material, but material it believes to be inaccurate. In such a circumstance, the newspaper may be seen to have published the material with knowledge of its falsity but it is protected from liability as long as its report fairly encapsulates the official matter upon which it is reporting. In a certain sense, then, a newspaper may be guilty of publishing a falsehood with "actual malice" but it may be relieved from liability by showing that it did not abuse its privilege to fairly report on official proceedings.

attempt of the publisher is not to report upon such governmental proceedings, but merely to use them tangentially as the basis of some other assertion, the Court indicated that the focus must be on whether the use of that record was reasonable. *Id.* While conceding that a publication has no absolute duty to investigate, the Court recalled that merely by feigning ignorance or professing good faith, the publisher could not escape liability where "there are clear indications present which bring into question the truth or falsity of the defamatory statements". *Id.* at 538. In analyzing the case before it, the Court found that there were obvious reasons for the publishers to doubt the veracity of the information and that only the "most prefunctory investigation" of the charges were conducted. *Id.* In essence, the Court found that the authors had a particular story-line in mind and adjusted the materials in its possession to fit that story-line regardless of other factors within their knowledge. *Id.* In such a case, actual malice as well as the abuse of the Fair Report privilege could be inferred and liability properly imposed on the publisher.

In the present case, the Court is confident that its instructions to the jury accurately defined the perameters of actual malice and the standard by which it was to be judged.[8] The Court defined actual malice as follows:

> "Actual malice means that the Defendant newspaper knew that the defamatory statement was false when it published it or it published the

[8] Clearly, the Court delineated to the jury that the Plaintiffs were required to prove actual malice and their entitlement to punitive damages by clear and convincing evidence. T.R. 1500. After extensively defining the lesser standard of fair preponderance of the evidence, T.R. 1501, the Court correctly noted for the jury that proving something by clear and convincing evidence is of a higher

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defamatory statements with reckless disregard of whether they were false or true. This means that the evidence must establish by clear and convincing evidence that the defamatory statement or that any defamatory statement was published with the knowledge that it was false or the entertainment of serious doubt as to the truth of the statement. Negligence, carelessness, bad judgment or inaccuracy in the preparation of the article is insufficient to prove actual malice. The mere failure to investigate does not establish reckless disregard, nor does mere negligence, negligent acts constitute actual malice. The reckless conduct which constitutes recklessness or a reckless disregard is not measured by whether a reasonable prudent man would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the Defendant, in fact, entertained serious doubt as to the truth of the publication. Publications with such doubt show reckless disregard to the truth or falsity, and this demonstrates actual malice. Actual malice has been interpreted as an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers. If you find from the evidence that the Defendant newspaper

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order than proof by preponderance, but not as high as the reasonable doubt standard utilized in criminal cases. T.R. 1501-1502. The Court fails to see how it could have given the jury a more precise and meaningful rendering of the standard of clear and convincing evidence. The Court believes that the points proposed by the Defendant with regard to this matter were unduly confusing, particularly in light of the fact that the words "clear" and "convincing" are words of common parlance and convey precisely what the law intends that they should convey. The Court is satisfied that the jury was well aware that it had to feel a greater sense of assurance about its findings of actual malice and punitive damages than it did as to other elements of the case, and in all respects knew that the burden of proof in these matters rested squarely with the Plaintiff.

made such an extreme departure, then you may find in considering this evidence that it acted with actual malice. In determining the possible existence of actual malice, the critical period of time is the date that the article was published. Actual malice is based upon knowledge possessed at the time that the article was published. Events and statements occurring after the article was published may be considered only to determine what knowledge the newspaper had at the time that the article was published." T.R. 1506-1507.

While this charge may have not been in the language preferred by the Defendant, a comparison of the charge with the language and the cases cited heretofore will demonstrate that the instruction was complete and correct. Since the Court believes that its charge did not mislead or prejudice the jury, the failure to give the charge in words suggested by the Defendant is not error. *See, generally, Geyer vs. Steinbronn* 506 A.2d 901, 911 (Pa. Super. 1986).

Furthermore, the Courts' review of the evidence adduced here compels it to conclude that the jury properly found that the publication was done with actual malice. While a full recitation of all of the evidence bearing on these issues is not possible, certain materials may be highlighted.

First, it must be noted that the primary source for evidence contained in Exhibit 1 was Robert Ciaffoni. T.R. 561-562. Certainly, in the context of this case, Robert Ciaffoni could not be considered a source of information as competent as the United States Civil Rights Commission or the National Audobon Society. This reflects no personal judgment by this Court on Mr. Ciaffoni, who did not testify at this trial. It does reflect, however, matters of record known to the *Post Gazette* at the time the article in question was published.

For example, it was clear to the *Post Gazette* that Robert Ciaffoni was a most interested party in the action itself. He was an intensely involved litigant and, just as the mere denial of a charge by a defamed party is not enough to cause the publisher to refrain from its circulation, so too, the mere allegation by an interested party is not sufficient to establish unassailable credibility.

Secondly, the *Post Gazette* was aware of an allegation by then Washington County Common Pleas Court Judge, Paul Simmons, that Mr. Ciaffoni was a "liar". Surely, this allegation was made in a particular context, but nonetheless should have caused Ciaffoni's information about the case to be approached with some caution.

Moreover, the *Post Gazette* reporter responsible for drafting the article was aware of the bitter feelings which Robert Ciaffoni and his sister had against Richard DiSalle and of at least one specific allegation by Robert Ciaffoni against Richard DiSalle (that DiSalle ran "will factory") which was completely without substance. T.R. 610-615, 698.

In addition to some objective doubts about the information provided by Robert Ciaffoni, the *Post Gazette* had in its possession information from other sources which affirmatively supported DiSalle's good faith in his conduct with respect to this case. For example, the *Post Gazette* was well aware that on September 25, 1978, Judge Keim had upheld the validity of Paul Ciaffoni's will. While exceptions had been filed to this finding, the *Post Gazette* was aware of certain matters which substantially supported it. Most significant of these were the opinions of expert Ordway Hilton and Postal Inspector Lockard who had concluded

that the will was genuine. T.R. 345 to 367, 668. With respect to the allegations of sexual intimacy between Richard DiSalle and Elizabeth Cowden, while the *Post Gazette* was aware of the allegations of this nature by Richard DiSalle and his sister, they were also aware that counsel for the will contestants had clearly disdained any such basis for the attack on the validity of the will and had not raised it with Richard DiSalle during his testimony at the trial of the case. T.R. 1193-1210 (page 96 of the deposition re-countered therein); T.R. 157-158. The deposition from which this inuendo arose was never introduced at the will contest hearing. Indeed, the only hard evidence known to the *Post Gazette* at the time of the publication to support the charge was an indication that Mr. DiSalle had been in the Ciaffoni residence with Ms. Cowden for a brief period of time. Such check that was made of others who may have had further information in this regard proved negative. T.R. 642-649. And, while his denials could obviously be dismissed as the product of his own interest, the *Post Gazette* was well aware of Richard DiSalle's own vociferous and vehement denial of wrongdoing both made at trial of the case (T.R. 682) and in an off-the-record conversation with David Leherr of the *Post Gazette* in the spring of 1979. (T.R. 589 et seq.; Exhibit 6).

In fact, a portion of Exhibit 6, being the memorandum from David Leherr of the *Post Gazette* to Thomas Porter, the reporter of the ultimate article, gives evidence that substantial doubts did exist in the minds of the *Post Gazette* about the validity of the allegations against Richard DiSalle. While opining that DiSalle "looks a bit shady to me" Leherr did observe that "I think he does raise points that have to be examined to find if there are flaws". T.R. 639. The points raised by DiSalle which Leherr obviously felt merited caution and

further examination were generally whether the Court records supported the extensive off-the-record denials DiSalle had made. *See,* T.R. 167-182. Leherr questioned if the *Post Gazette* had spoken to Richard Sprague (the attorney for the proponents of the will) or any of the experts who examined the document in question. T.R. 639. Leherr also wondered why the "sex questions" had not been brought out in open Court since they would have established a motive for DiSalle to "doctor the will". T.R. 639. Leherr concluded his memo by hoping that the off-the-record comments of DiSalle would give Porter "some leads to pursue". T.R. 639.

Leherr's notes of caution were evidently not heeded by his associates at the *Post Gazette.* Neither Hilton nor Sprague were ever contacted, T.R. 639-641, 655, and, similarly, Patricia McFarland and Francis Gray, who were also listed as conspirators, were never approached for information. T.R. 771-772, 787-788.

From this information and from the totality of the record here, the jury could well have concluded that as of September 10, 1979, the *Post Gazette* had substantial doubts as to the validity of the sensational allegations made against Richard DiSalle.

Moreover, many statements exist in this record to the effect that the *Post Gazette* personnel involved in the creation of this article were not overly concerned about the underlying truth of these allegations. (*See,* T.R. 495, 646, 693 and, generally, the testimony of David Warner, particularly at 1229 and following). The *Post Gazette* was apparently concerned only that these allegations were made in some record somewhere, and that they could thereafter be woven into the fabric of an article which did not have as its primary focus a report on the judicial proceedings which had occurred in Washington

County many months before the article was put to print. It is not that the *Post Gazette* was obligated to check and verify all possible leads to avoid the finding of actual malice here. Nevertheless, the many objective factors negating the truth of the allegations by Robert Ciaffoni against Richard DiSalle and the Defendant's disinclination to pursue the truth here certainly substantiated the finding that the jury made.

Of course, even though the evidence was sufficient to support a finding that the *Post Gazette* published the material in question with actual malice, the Defendant was additionally required to prove that there was an abuse of the Fair Comment or Fair Report privilege before recovery could be sustained. The Court charged the jury with respect to the privilege as follows:

> "The conditional privilege that applies in this case is called a fair comment privilege. A newspaper is not a grantor[7] of the truth of the material published. In certain situations, a newspaper is legally permitted to publish false and defamatory statements without legal responsibility to the person who is the defamed. In such situations, the newspaper possesses what is referred to as a conditional privilege or a fair comment privilege. This privilege is based upon public policy, namely, the public's right to keep abreast of matters of public concern. One of the areas of public concern which invokes or brings into play the fair comment privilege is a report or newspaper article about a judicial proceedings. The rule of law governing this type of conditional privilege is as follows:
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> The publication of a report or a newspaper article about a judicial proceedings is privileged and is immune from legal responsibility to pay damages to

[7] It would appear that the Court's usually precise court reporter has mis-rendered the word "guarantor" in this respect.

a person defamed, although it contains matters which is false and defamatory, if the article is accurate and complete, or if the article is a fair abridgment of the judicial proceedings and a fair abridgment or the definition of the word abridgment is a reduced form of a work retaining the general sense or unity of the original. It is a synopsis or summary of the complete version. However, if the statement is made solely for the purpose of causing harm to the person defamed, the statement is not privileged.

It is not essential that the newspaper set forth the entire proceedings verbatim. A summary that is fair and substantiallly (sic.) accurate is all that is required. A statement is substantially accurate if it produces the same effect on the minds of the readers which the precise truth would have produced.

To invoke the immunity of the fair comment privilege, not only must the report of the judicial proceeding be accurate, but it must be fair. Even a report that is accurate, so far as it goes, may be so edited and deleted as to misrepresent the proceedings, and thus be misleading. Thus, although it is unnecessary that the report be exhaustive and complete, it is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression to those who read it. A newspaper may be entitled to the immunity provided by the fair comment privilege because it is reporting a judicial proceeding. However, it will lose this immunity if it abuses the privilege. If the report or newspaper article is not a fair synopsis or summary of the judicial proceedings, the privilege is abused and lost. If the report or newspaper article is published solely for the purpose of causing harm to the person published, the privilege is abused and lost.

In this case, I am ruling that relative to the article in question, the Pittsburgh Post Gazette is entitled

> to the fair comment privilege. You, the Jury, have the responsibility to decide whether this privilege was abused and lost." T.R. 1509-1511.

This instruction was well in accord with the established law in Pennsylvania regarding the fair comment privilege.

Since great responsibility is placed upon the news media to report the proceedings of government fully and accurately, *see, Cox Broadcasting Corporation vs. Cohn* 420 U.S. 469, 492 (1975), it is important that the media be given some relief from the ancient common law rule that one who republishes a libel is responsible as if they were the original defamer. *Medico vs. Time, Inc.* 643 F.2d 134, 137 (3rd Cir. 1981). The decision in *Medico* contains an extensive review of the underlying basis of this privilege in Pennsylvania, and holds that Section 611 of the restatement of Torts Second is the law of the Commonwealth in this area.

Essentially, so long as a report is a fair and accurate summary of an official proceeding, it is privileged and the law does not assume that the reporter adopts the defamatory remarks made as his own. *Medico, supra.* While this privilege may enjoy a constitutional dimension, it is also rooted in the policy to encourage public awareness of legal and governmental proceedings. *Id.* at 142-143. The privilege may be defeated, however, if the report is not fair and accurate (or a fair abridgement of the proceedings), or if it is published solely with the intent to harm the one defamed. *Id.* 146. *See,* also *Binder vs. Triangle Publishing Inc.* 275 A.2d 53, 56 (Supreme Court 1971); *Sciandrea vs. Lynett* 409 Pa. 595 187 A.2d 586 (1963).[8]

[8] Additional authority may be gleamed from the review of *Lowe vs. CBS, Inc.* 726 F.2d 97, 99 (3rd Cir. 1984). The Court's statement of the fair report in that case was simply that if the account is fair,

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Additional insight into the proper formulation of this privilege can be obtained by reviewing two decisions of the United States Court of Appeals for the Third Circuit arising out of our sister state of New Jersey. *Schiavone Construction Co. vs. Time Inc.* 735 F.2d 94 (3rd Cir. 1984); *Lavin vs. New York News Inc.* 757 F.2d 14, 16 (3rd Cir. 1985). As in Pennsylvania, the New Jersey conditional privilege applies if the report is accurate, complete or a fair abridgement of the proceedings and if the article is not published solely for the purpose of causing harm. *Schiavone Construction Co. supra.* at 97. Moreover, while the report may be accurate as far as it goes, if it is not a complete report, a factual question of fairness may be created which is properly submitted to the jury. *Id.* at 98. *Lavin* described the nature of the distillation as being fair if it would have a "sting" equal to the original proceeding from which it was drawn. *Lavin supra.* 1420.

The cases of *Time Inc. vs. Pape, supra.* and *Edwards vs. National Audobon Society, supra.*, are good examples of situations in which the report was fair and accurate and conveyed no more of a "sting" than the material from which it was drawn. *Gertz vs. Robert Welch Inc.* 680 F.2d 527 (7th Cir. 1982), is a case of the other variety wherein the material summarized did not fairly and accurately reflect the original materials. Moreover, the *Gertz* case illustrates that, unlike in situations such as *Time Inc. vs. Pape,* the conditional privilege must be viewed in different contexts when, as in *Gertz,* the

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accurate and complete and was not published solely for the purpose of causing harm to the persons defamed, it is a privileged communication, even though false. This formulation of the privilege affirmatively points out that to defeat the asserted privilege, the Plaintiff must prove that either the report was not fair, accurate and complete or that it was published solely for the purpose causing harm to the person defamed.

essential thrust of the article is only tangentially related to the official court or government records and is more concerned with reporting on some more contemporary theme. *Id.* at 536-537.

In the present case, it must be recalled that the legal proceedings in Washington County which formed at least part of the article in question had been completed for some time. There was much more that had gone on in the case than simply the deposition of Robert Ciaffoni. As in the *Schiavone* case, while that which was reported in the newspaper may have been accurate *as far as it went,* a substantial question arose as to whether the report was complete. The record here suggests, indeed, that the *Post Gazette* focused on only one small part of the record of the will contest in Washington County in order to fit the contours of a story which was not essentially directed at providing a synopsis of that legal contest. Further, the portion of the legal proceeding selected hardly represented a fair abridgement of that which had occurred before Judge Keim.

The article which ultimately appeared in the September 10, 1979 edition of the *Post Gazette* was substantially misleading and inaccurate with regards to several points pertaining to the will contest proceedings which had occurred months before in Washington County. From earlier drafts of the article, certain important matters were deleted, including all reference to the examination of the will by Ordway Hilton, the names of two other persons who are alleged by the contestants of the will to be co-conspirators in its making, and Richard DiSalle's denial of wrong-doing at the trial. T.R. 633-683. Moreover, the report regarding the examination of Robert Lockard of the Postal Service was substantially distorted, and implied that he had severe questions

about a page of the will which were material to the Court's determination. Lockard's report, in fact, indicated that there was no significant evidence to challenge the authenticity of the will, and while he questioned the second page of the will, that page was not in any way in controversy. T.R. 668, et seq.

Furthermore, even the reference in the article to the small portion of the deposition of Robert Ciaffoni was hardly complete since the report did not point out that the statement of Ciaffoni in the deposition was circumscribed by the comment of his attorney that no allegation regarding such intimacy was being made or relied upon by the contestants of the will, *See,* T.R. 1193-1210, or that this allegation was not ever reported at trial. Given this, there is a question as to why the *Post Gazette* selected this obscure passage of the deposition at all.

A disturbing answer to this question may be seen in the record. It is apparent that when Mr. Porter first developed a draft of this story, it lacked a feature which would give it greater reader interest than a factual report of the will proceedings in Washington County would have provided. As Mr. Porter's supervisor indicated to him, there was a "hole" in the story. This "hole" apparently disturbed Mr. Leherr since it was never quite clear why anyone with Richard DiSalle's impeccable reputation would have ever become involved in so bizarre a scheme as alleged by Robert Ciaffoni. In order to make Robert Ciaffoni's story sensible, then, the *Post Gazette* extracted from his deposition the tantalizing illusion to DiSalle's supposed intimacy with Elizabeth Cowden. This provided a motive and an "angle" on the story which would conform it to Mr. Warner's interest in having the article focus more on the feelings and beliefs of the family members than the facts of the case. *See,* T.R. 621-629, 506-511, 1217.

Indeed, it struck the Court as this testimony came in, (particularlly the testimony of Mr. Warner), that it was not truly the primary or secondary purpose of the *Post Gazette* to fairly and accurate synthesize the proceedings in Washington County. The article reads more like the rendering of an emotional forum for Robert Ciaffoni to describe the impact of a controversy on his family. This purpose, did not, however, relieve the *Post Gazette* of its obligation to fairly abridge the proceedings which had occurred many months before the article was printed. By unfairly highlighting a minuscule part of these proceedings and mis-characterizing it to suggest that it had been a serious charge, the jury was properly allowed to draw the conclusion that the Fair Comment privilege had been abridged.

The final element of the Plaintiff's case in this matter was to prove that he had suffered injury at the hands of the Defendant's libel. It is clear under Pennsylvania law that mental anguish and humiliation are compensable in an action such as this, and that direct economic injury need not be proven. *Agriss vs. Roadway Express, Inc.* 483 A.2d 456, 467-473 (Pa. Super. 1984); *Marcone vs. Penthouse International* 754 F.2d 1072, 1079 (3rd Cir. 1985). The Plaintiff offered direct testimony with respect to the effect of this article on him. T.R. 984-1004. Moreover, the testimony of the various people from the community whom the Plaintiff called also circumstantially established that the Plaintiff's sensitivities about the effect of this article were reasonable and well founded. This testimony amply supported the entry of damages in this case.[9]

[9] Furthermore, the Court permitted the jury to consider the question of loss of consortium damages by Joan DiSalle. Enough language exists in a variety of cases dealing with this area to indicate to the

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In addition to compensatory damages, the Plaintiff sought punitive damages in this case. The Court instructed the jury that punitive damages could not be awarded unless the jury found that they were proper in this case by clear and convincing evidence. Generally, punitive damages are to be awarded only when outrageous conduct has occurred and, in the context of a libel, actual malice must be shown before punitive damages can be awarded. *Marcone supra.* at 1087-1088, *Geyer vs. Steinbronn* 506 A.2d at 93-916. The Court's instructions in the area of punitive damages were exhaustive and accurate in light of the applicable law:

> "If punitive damages are to be awarded, the evidence must establish by clear and convincing evidence that the Defendant Newspaper's conduct was outrageous; that is, it acted with a bad motive or with a reckless indifference to the interests of others." T.R. 1513.
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> "If you find by clear and convincing evidence that the conduct of the Defendant was outrageous, you may award punitive damages as well as compensatory damages in order to punish the Defendant for the conduct and to deter the Defendant and others from doing similar acts. A person's conduct is outrageous when he acts with a bad motive or when he acts with reckless

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Court that its judgment in permitting the jury to entertain this verdict is sound. *See, Geyer vs. Steinbronn* 506 A.2d 901, 912 (Pa. Super. 1986) (Loss of consortium damages awarded where claim involved libel and intentional interference with contractual relations); *Agriss vs. Roadway Express, Inc. supra.* at 474 (in a defamation action a Plaintiff may recover for any injury of which the libel is the legal cause, just as in any other tort recovery); *Coughlin vs. Westinghouse* 603 F. Sup. 377, 390 (Eastern District of Pa. 1985) (Court dismisses wife's claim for loss of consortion solely on the basis that the Plaintiff himself had not made out a case for libel).

indifference for the interest of others. If you decide that the Plaintiff, Richard DiSalle, is entitled to an award of punitive damages, the amount must be affixed by you. In doing so, you may consider any and all of the following factors: The character of the Defendant's acts, the nature and extent of the harm of the Plaintiff which the Defendant caused or intended to cause, the wealth of the Defendant insofar as it is relevant in fixing an amount which will punish it and deter it and others from similar conduct in the future. The amount you assess as punitive damages need not bear any relation to the amount you choose to award as compensatory damages. If you award any compensatory damages, and it is not necessary that you award compensatory damages to the Plaintiff in order to assess punitive damages against the Defendant, so long as you find in favor of the Plaintiff and against the Defendant the question of liability. You must find that the Defendant was liable to the Plaintiff before you can assess any punitive damages. The amount of punitive damages awarded must not be the result of passion or prejudice against the Defendant on the part of the jury. The sole purpose of punitive damages and the only purpose for which you may make an award and set an award of punitive damages is to punish the Defendant's outrageous conduct and to deter the Defendant and others from the commission of similar acts." T.R. 1515-1517.

The Court is confident that the jury's award of punitive damages was proper here. As noted previously, actual malice had been made out in this case and, overall, the Defendant's actions evidenced a particular disregard for its responsibilities as a major news gathering and conveying source. Far from attempting to report dispassionately on a dispute which had ripened into a protract legal proceeding, the purpose of the *Post Gazette* was to sensationalize this bitter family

controversy by lurid suggestions of fraud and sexual impropriety by a man whose reputation was above reproach. It is not simply that the article prepared by the *Post Gazette* was replete with inaccuracies; it was more that the editors in charge of the preparation of the article found it necessary to insert an unfounded and sensational element to fill a "hole" in the story. Rather than reporting accurately that this "hole" was not even of prime consideration to counsel for the contestants, the *Post Gazette* highlighted it in such a way as to leave the natural impression on the part of the reader that a serious question of Mr. DiSalle's competence and integrity had been entertained in a court of law.

The Defendant has strongly urged us to grant a remittitur of the damage award in this case, particularlly as it relates to the punitive damages granted by the jury. We respectfully decline this invitation.[10]

We must first note that it is well-settled law in Pennsylvania that the judgment with respect to the award of punitive damages and the amount rendered are within the sound discretion of the jury. *Delahanty vs. First Pennsylvania Bank* 466 A.2d 1243, 1263 (Pa. Super. 1983). The reduction of punitive damages will occur only if the court determines that "they are excessive under the facts of the individual case". *Id.*

In defamation cases, particular sensitivity is required in the review of punitive damage awards since punitive damages by definition go to punish conduct and to deter future conduct of a similar kind. Given that the underlined conduct at issue in a defamation case is speech, fear is expressed that the award of punitive

[10] Implicitly, we reject the suggestion of the amicus that we hold that punitive damages should not be awarded in defamation cases. We preceive no precedent or policy to justify such a limitation.

damages in one case may have a chilling effect on the exercise of speech interests in future matters. *See, generally Geyer vs. Steinbronn* 506 A.2d 901, 913, et seq. (Pa. Super. 1986). Thus, to justify punitive damages in defamation cases, the plaintiff must show actual malice on the part of the defendant. *Walder vs. Lobel* 48 A.2d 622, 626 (1985).

While the court remains admonished not to substitute its judgment for that of the jury's even in the context of a defamation case, an award of punitive damages may be remitted where it is so excessive as to shock the conscience of the court or to represent an award clearly based solely upon passion and prejudice. *Geyer vs. Steinbronn supra.* at 912; *Walder vs. Lobel supra.* at 626-627. *See,* also *Feld vs. Merriam* 461 A.2d 225, 237 Pa. Super. (1983), reversed on other grounds, 485 A.2d 472 Pa. (1984). The court is convinced that the jury properly weighed pertinent factors in reaching its judgment and the court's conscience is at peace with this award in the unique context of this case.[11]

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[11] In its consideration of the punitive damage award, the jury properly weighed evidence of the wealth of the Defendant so as to determine a proper foundation for assessing a correct punitive measure. *See, Feld vs. Merriam infra.* 461 A.2d 225, 237; *Thomas vs. American Cystoscope Makers Inc.* 414 F.Sup. 255 (E.D. of Pa. 1976). In this case, the court properly admitted the testimony of Raymond Burnett, a financial officer of the P.G. Publishing Company to the effect that the P.G. Publishing Company paid to its parent corporation dividends in excess of $1 million dollars in each of 1983 and 1984. While the *Post Gazette* newspaper had never been itself assessed by generally accepted accounting principles as an economic entity, the evidence of dividends paid was pertinent to this consideration, particularly in light of the fact that the other asset owned by the P.G. Publishing Company during this time (WWSW Radio) had lost approximately a quarter of a million dollars in 1983.

(Footnote continued on following page.)

While the court appreciates the citation of counsel to a variety of other defamation cases in which remittiturs have either been granted or refused, the court strongly believes that the propriety of granting a remittitur is sensitive fundamentaly to the facts of the case before it. In the context of this case, Court agrees that the gravity of the harm here was substantial. The reputation of this plaintiff was of such a nature that the substantial assault on it by the *Post Gazette* did damage to the Plaintiff of considerable proportions. The nature of the actions of the *Post Gazette* in causing that harm were similarlly severe. This article was not the report of a fast-breaking news story in which time for reflection and thought on the part of the newspaper was out-weighed by the need to quickly and properly report the essence of the facts to the public. This article had been prepared over a substantial period of time and the selection of the material to be placed in the article was done with direction and pre-meditation by the officials of the newspaper. The article itself was not an attempt to

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(Footnote continued from preceding page.)

In 1984, the radio station had been sold for approximately $4.6 million dollars with the proceeds passing through to the parent company. *See* T.R. 968-978. Both sides were able to develop this evidence and argue it fairly to the jury. This evidence was relevant, and, in the court's charge, the jury was instructed clearly to consider this evidence only with respect to the issues of punishment and deterence for the defendant's actions. *See,* T.R. 1516-1517.

The objection made by counsel to the references to the closing argument of counsel for the plaintiff with respect to punitive damages is frivolous. Counsel's comments at 1490 and 1491 were fair comment on the evidence and well within the legitimate perameters of argument. To the extent that there was a suggestion that counsel mis-stated the facts of the case, the court clearly charged the jury that it was their recollection of the facts which governed and the comments of counsel bearing on the law were to be disregarded if they were in conflict with the court's authoritative instructions. *See,* T.R. 1497-1499.

dispassionately report on a legal proceeding in Washington County. Rather, it sought the more sensational angle of the family's turmoil and, to further enhance reader interest, injected the notion that a respected and responsible lawyer acted with gross impropriety in conduct striking at the very heart of his personal and professional reputation. The *Post Gazette* did not seek the fair and accurate reporting of these events; it sought melodrama.

While the award of punitive damages is concededly high, the court believes that the award is within the bounds of propriety and will not be disturbed.

Two additional points raised by the Defendant merit only brief comment.[12]

First, objection has been made as to the Court's permitting the jury to consider the fact that in 1981, approximately two years after the defamatory article was published, the *Post Gazette* endorsed Richard DiSalle for a position on the Superior Court. The Court admitted this evidence as probative on the issue of the Defendant's state of mind at the time that the article was published, since such state of mind is critical to a determination of the existence or absence of actual malice. It is significant that during the two year interim, no new information had come to the *Post Gazette* regarding the Ciaffoni will. An event subsequent to the occurrence of an action may be probative on the issue of the intent of the actor at the time of its occurrence since no new facts had come to the attention of the newspaper during the intervening two years, the court properly

[12] The defendant had raised certain other matters in his post-trial motions which he did not note in his accompanying brief. The court has reviewed those additional matters and find them to be without merit.

allowed the jury to consider this evidence and to give it such weight as the jury felt appropriate. The Court does not believe that any error occurred in the admission of this evidence.

Finally, the Plaintiff has suggested to us that delay damages should be properly added in this matter. The Defendant has properly brought to our attention the recent decision of the Supreme Court of Pennsylvania in *Craig vs. McGee Memorial Rehabilatation* _____ A.2d _____ (Supreme Court of Pennsylvania, decided October 8, 1986).

In this decision, the Supreme Court suspended the operation of the Pennsylvania Rule of Civil Procedure 238 to the extent that it operated automatically to assess delay damages without regard to fault. The ruling of the Court was made prospective only, but was made applicable to those cases in the post-trial stage in which challenges to the imposition of Rule 238 damages were made.

In the present case, the Plaintiff has requested Rule 238 damages and that request has been opposed by the Defendant. Accordingly, we believe that the *Craig* opinion is applicable here and precludes us from undertaking a mechanical application of Rule 238 with respect to the Plaintiff's plea.

The Supreme Court admonished, however, that in cases where a challenge to the Rule 238 damages has been preserved, the court is to fashion a resolution consistent with the *Craig* opinion. In *Craig*, the Supreme Court determined that in order to decide upon a Plaintiff's entitlement to delay damages, more than the mere length of time between the starting date of the case and the verdict was to be considered. A variety of

factors were identified in the opinion including the respective responsibilities of the parties with respect to delays in bringing the matter to trial, the parties' compliance or lack thereof with the rules of discovery, delays occasioned by the addition of new parties, "and other pertinent factors". *Craig, supra.*

Given the fact that the Plaintiff presented his petition for delay damages before the Supreme Court's pronouncement in *Craig,* the Court believes that the Plaintiff should be entitled to amend his petition for delay damages (if he can) to assert those factors which the Plaintiff believes are present in this case and which would support an award of delay damages in accordance with the *Craig* opinion. Accordingly, the Plaintiff's current petition for the imposition of delay damages will not be considered at this time, but the Plaintiff will be granted a brief period to submit an amended petition if he so chooses. If necessary, the Court will hold a hearing to determine any factual disputes which may arise as a result of this amended pleading.

CONCLUSION

This has been a most difficult case for the Court. There is no doubt but that the preeminent position of speech in the Constitutional array of rights is well-founded. Not only is the exercise of free speech a necessary concomitant to the processes of a democratic society, but societal growth itself is dependant upon the free flow of ideas. Instead of opting for a system in which the government or some pre-selected group of censors ordains that which shall be orthodox in religion, politics or social views, the founders of our republic determined that ideas large and small, mundane and unconventional, should be permitted to freely clash in the crucible of

open debate and criticism. It was assumed that through a process akin to natural selection, the ideas of substance would prevail in this crucible and others would wither and be rejected by the force of reason and logic within our people. For such a system to operate, artificial restrictions and limitations on the inter-play of these ideas was not to be tolerated.

Such preeminence of the interest of this free exchange of ideas does not, however, give those whose voices are louder than others the right to use that power to cause substantial harm to the delicate but highly tangible interest of a person in their good reputation. Where a major publishing voice such as the *Post Gazette* engages in a reckless disregard of the truth by such imposing allegations as were leveled against Richard DiSalle, and does so in breach of its duty and privilege to fairly report on the processes of the courts, the exchange of free ideas necessary to the democratic process and the cultural growth of our society remains undisturbed. All that is punished is conduct of an assaultive nature. Where normally we think of assault as attacks on the property or person of another, that which was under seige here was the well-deserved reputation of a man whose life may never fully recover from the harm caused here.

The Court believes that the jury properly found its way through the dark puzzle presented by the law of defamation and arrived at a verdict which substantially regarded the competing interests which are constantly at war within it. The Court believes that in the crucible of this trial, what was forged was a just verdict.

Supreme Court, U.S.
FILED
MAY 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1638

IN THE
Supreme Court of the United States
October Term, 1988

—o—

PG PUBLISHING COMPANY, t/a THE PITTSBURGH POST-GAZETTE, a corporation,

Petitioner,

vs.

RICHARD DISALLE and JOAN DISALLE, his wife,

Respondents.

—o—

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

—o—

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39 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Where Petitioner's false and defamatory article, published with actual malice, was both unfair and inaccurate, and where Petitioner espoused and concurred in the charges against Respondent Richard DiSalle, has not Petitioner failed to present a case to which the neutral reportage doctrine is applicable, even assuming that doctrine has a constitutional basis?

2. Where, in the Pennsylvania courts, Petitioner failed to raise a due process or excessive fines constitutional defense to punitive damages but rather agreed that punitive damages could be awarded on a showing of actual malice and common law malice (outrageous conduct), has not Petitioner waived its right to present such constitutional arguments in this Court?

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COUNTERSTATEMENT OF THE CASE

The trial record demonstrates that Petitioner's high-ranking editorial officials—its managing editor, its city editor and its assistant city editor—conspired to re-write a reporter's first draft of a story about the trial of a will contest so as to defame then Commonwealth Court Judge Richard DiSalle[1] by accusing him of having participated in a scheme to produce a fraudulent will and of having done so because he was engaged in a meretricious relationship with Elizabeth Cowden, the testator's daughter. The will was drafted by DiSalle in 1968 prior to his assuming the bench[2]. The testator, Paul Ciaffoni, died in 1974 and a son, Robert Ciaffoni, became the principal contestant of the will.[3]

The trial record shows that the reporter assigned by Petitioner to write a story about the will contest (the trial

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[1] From the outset DiSalle conceded that he was a public official subject to the actual malice rule, and that he had the burden of proving falsity.

[2] DiSalle, a graduate of the University of Pittsburgh Law School where he was a member of the Law Review, had originally been elected to the Court of Common Pleas of Washington County in 1969. Eight years later, he was elevated by then Governor Milton J. Shapp to an appellate position on the Commonwealth Court. In 1980, he was appointed as an appellate judge on the Superior Court by then Governor Dick Thornburgh. Both appointments were based on Pennsylvania's merit selection process and on both occasions DiSalle was highly rated by the Pennsylvania Bar Association and unanimously confirmed by the Pennsylvania Senate.

[3] The authenticity of the will drafted by Richard DiSalle was most recently upheld by the Pennsylvania Superior Court on April 13, 1989, at No. 393 Pgh. 1988, affirming a decision by a judge of the Court of Common Pleas of Philadelphia County, specially presiding, who held that the will had never been altered. The testator's widow had previously withdrawn her appeal.

of which had taken place six months earlier) wrote a first draft which was non-defamatory. That first draft included the fact that a renowned questioned-document expert and a postal inspector, both engaged by the contestants, had examined the will and concluded that it was authentic. A. 91a; 101-2a. Furthermore, the first draft contained no reference to any improper relationship between Richard DiSalle and Elizabeth Cowden.

The record then shows that the reporter's superiors, principally the managing editor and the assistant city editor, directed the reporter to add to the article a statement excerpted from Robert Ciaffoni's pre-trial deposition, even though they knew that the deposition had never been used or referred to at the trial. This excerpt referred to the alleged meretricious relationship. The reporter's superiors also deleted any reference to the report of the contestants' document examiner and to the conclusion of the postal inspector that there was nothing to question the collective authenticity of the will. A. 7-8a; 108-10a; 112-13a.[4]

The record further shows that Petitioner, through its reporter and through its high-ranking editorial officials, at the time that they wrote and then published the article, actually knew: that Robert Ciaffoni had lied to the re-

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[4] Petitioner claims that the complaint filed by Respondents consisted in material part only of a claim that Petitioner had defamed Judge DiSalle by disseminating Robert Ciaffoni's charges of fraud and an extra-marital relationship with Elizabeth Cowden (Petition, p. 6). To the contrary, Respondents had made not only those allegations but had alleged that Petitioner, although purportedly reporting on a judicial proceeding, had excluded from the article everything that had occurred in the course of the will contest which was favorable to DiSalle. See Complaint in Trespass, App. 1-16.

porter during the course of the reporter's investigation (A. 101a); that Ciaffoni had been referred to as a "liar" by one of the judges who had handled the will contest proceedings (A. 101a); that the reporter considered Ciaffoni's statements to be "rantings and ravings"; that Ciaffoni had no evidence of any improper relationship between DiSalle and Cowden; that Ciaffoni had been "trying to get" DiSalle; that DiSalle had testified at the will contest trial, which took place one year prior to the article's publication, and nothing had been asked of him about any relationship with Cowden, nor was there any effort made by the contestants to prove such a relationship by attempting to admit Ciaffoni's deposition or by having Ciaffoni testify (A. 102a); that the deposition transcript contained statements by Ciaffoni's lawyer that they did not "purport to prove" any allegations regarding any such relationship; and that Ciaffoni himself had stated during the deposition that "I didn't find nothing" and "I don't say that, I don't know that" when questioned further about the alleged relationship (A. 102a).[5]

The record also shows that five months before the article was published DiSalle had been interviewed by

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[5] In the deposition, Robert Ciaffoni also claimed that there was a close relationship between his sister, Elizabeth Cowden, and Patricia McFarlane, his father's secretary who was an attesting witness to the 1968 will. In their appeal from probate, the contestants had alleged that McFarlane was one of the persons, along with DiSalle's secretary, Frances Gray, who were involved with DiSalle and Cowden in creating the false will. Petitioner's reporter, in his first draft, made reference to the allegations against McFarlane and Gray, but this was deleted by the reporter's superiors. In addition, no reference was made in the article to the alleged close relationship between Cowden and McFarlane which appeared in Ciaffoni's deposition. The only statement extracted from the deposition was the reference to the alleged sexual intimacy between DiSalle and Cowden.

Petitioner's state editor who wrote a memorandum to the reporter suggesting that a further investigation be performed, including learning why no attempt was made to prove any accusation against DiSalle during the will contest trial. The state editor's suggestions were ignored. A. 103a. At the time of the interview, DiSalle was a candidate for a full term on the Commonwealth Court but at the time the article was published on September 10, 1979, DiSalle was concluding his appointed term and was not a candidate for office, having been defeated in the May, 1979 primary.[6]

Finally, Respondents proved that Petitioner, both through its reporter and its other high-ranking officials, knew that DiSalle had an excellent reputation, both personal and professional.

At trial, Petitioner did not deny that its article was defamatory, nor did Petitioner attempt to prove that the allegations against Richard DiSalle were true. A. 90a.[7] Although at trial Petitioner raised the actual malice defense of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), subsequent to the verdict Petitioner has not contended, and does not now argue, that the evidence which the jury heard was insufficient to permit a finding that the article was published with knowledge of falsity or with reckless disregard of the truth.

Also at trial, Petitioner never used the term "neutral reportage" in claiming that it was protected by any de-

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[6] Petitioner claims that Judge DiSalle was campaigning for a full term on the court at the time the article was published (Petition, pp. 4-5). This is untrue; DiSalle's primary election loss ended his campaign.

[7] In its post-trial brief in the trial court, Petitioner conceded that Respondents "made a substantial showing . . . that the allegations made by the will contestants were false . . . and that there was no intimate relationship . . ." A.90a.

fenses other than actual malice and fair comment.[8] It did cite to the trial court *Time, Inc. v. Pape,* 401 U.S. 279 (1971), and *Edwards v. National Audubon Society,* 556 F.2d 113 (2d Cir.), *cert. denied* 434 U.S. 1007 (1977), without employing the concept of neutral reportage. Based on those cases, Petitioner requested the trial judge to charge the jury as follows:

> when parties to a Court proceeding . . . make serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity . . . what is newsworthy about such accusations is that they were made . . . The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them.

Respondent's Supplemental Proposed Point for Charge No. 44-A.[9] The trial judge responded by giving a charge which was even more favorable to the Petitioner than the one which it had requested, telling the jury:

> A newspaper is not a guarantor of the truth of the material published. In certain situations, a newspaper

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[8] The thrust of the present petition is that this case was tried as a neutral reportage case, basing that claim on two pages of the trial judge's opinion (Petition, p. 9, fn. 3). Nothing stated on those pages (A. 98-99a) or anywhere else in that opinion supports Petitioner's contention. In fact, Petitioner, at trial, claimed that it did not publish with knowing falsity or reckless disregard (no actual malice) and that the article was the report of a judicial proceeding (common law fair comment). In its post-trial motions, as shown by the opinion of the trial judge (A. 92-110a), Petitioner pursued the same contentions. Only after Petitioner reached the Superior Court did it begin using the phrase "neutral reportage."

[9] This request was consistent with Petitioner's averment in its Answer that the article was a report of a judicial proceeding. App. 17-18.

> is legally permitted to publish false and defamatory statements without legal responsibility to the person who is defamed. In such situations, the newspaper possesses what is referred to as a conditional privilege or a fair comment privilege. This privilege is based upon public policy, namely, the public's right to keep abreast of matters of public concern . . . The publication of a report or a newspaper article about a judicial proceeding is privileged and is immune from legal responsibility to pay damages to the person defamed, although it contains matters which is (sic: "are") false and defamatory . . .[10] A. 104a.

It was only after adverse verdicts were rendered and the trial judge denied the motions for post-trial relief that Petitioner began referring to "neutral reportage". In the Pennsylvania appellate courts, Petitioner took the position that this doctrine permitted anyone to publish a defamatory statement about any public official or public figure so long as the statement was made by someone else, even though the publisher knew that the statement was false or published it with reckless disregard of the truth. As noted *infra*, p. 11, Petitioner has apparently retreated from this position and now acknowledges that a report of a statement made about a public official must be both "accurate and disinterested". As set forth above, this is the instruction that the trial judge, in fact, gave to the jury.

With reference to damages, neither at trial nor on appeal before the Pennsylvania courts did Petitioner claim that punitive damages could not be awarded. In fact, at trial Petitioner specifically asked the judge to charge

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[10] Even if the trial court's charge did not track Petitioner's requested jury instruction verbatim, this was at most harmless error. See, e.g., *Mid-America Food Service, Inc. v. ARA Services, Inc.*, 578 F.2d 691, 701 (8th Cir. 1978).

the jury that "whether to award punitive damages and the determination of the amount are within [your] sound discretion"; and "in determining the amount of punitive damages, as well as in deciding whether they should be awarded at all, [you] can properly consider not merely the act itself but all the circumstances including the motives of the [Defendant], the relations between the parties and the provocation or want of provocation for the act." Petitioner's Supplemental Proposed Points for Charge Nos. 69 and 70. On appeal, Petitioner, for the first time, claimed that the punitive damage award was excessive under the common law of Pennsylvania because it did not bear a reasonable relationship to the compensatory award.[11] The Superior Court rejected this argument because Petitioner had not raised it at trial or even in its motions for post-verdict relief.[12] A.65a

Following the jury's verdict, the trial judge filed an opinion denying Petitioner's motions for post-trial relief and in so doing stated:

> Furthermore, even the reference in the article to the small portion of the deposition of Robert Ciaffoni was hardly complete since the report did not point out that the statement of Ciaffoni in the deposition was circumscribed by the comment of his attorney that no

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[11] The present petition (Question Presented C, p.i.) restates Petitioner's proportionality argument but, for the first time, cites the Eighth and Fourteenth Amendments in support of that contention. See p. 13, *infra*.

[12] The trial judge instructed the jury that punitive damages did not have to bear a relationship to compensatory damages and Petitioner took no exception to that charge. The Superior Court held that because Petitioner failed to raise proportionality it could not use disproportionality as part of its argument that the punitive damage award was excessive. A.65-66a.

allegation regarding such intimacy was being made or relied upon by the contestants of the will . . . or that this allegation was not ever reported at trial. Given this, there is a question as to why the *Post-Gazette* selected this obscure passage of the deposition at all. A. 109a

* * *

Indeed, it struck the Court as this testimony came in . . . that it was not truly the primary or secondary purpose of the *Post-Gazette* to fairly and accurately synthesize the proceedings in Washington County. The article reads more like the rendering of an emotional forum for Robert Ciaffoni to describe the impact of a controversy on his family. This purpose did not, however, relieve the *Post-Gazette* of its obligation to fairly abridge the proceedings which had occurred many months before the article was printed. By unfairly highlighting a minuscule part of these proceedings and mis-characterizing it to suggest that it had been a serious charge, the jury was properly allowed to draw the conclusion that the Fair Comment privilege had been abridged. A. 110a

* * *

It is not simply that the article prepared by the *Post-Gazette* was replete with inaccuracies; it was more that the editors in charge of the preparation of the article found it necessary to insert an unfounded and sensational element to fill a "hole" in the story. Rather than reporting accurately that this "hole" was not even of prime consideration to counsel for the contestants, the *Post-Gazette* highlighted it in such a way as to leave the natural impression on the part of the reader that a serious question of Mr. DiSalle's competence and integrity had been entertained in a court of law. A. 112-13a.

* * *

This article was not the report of a fast-breaking news story in which time for reflection and thought on the part of the newspaper was out-weighed by the need to

quickly and properly report the essence of the facts to the public. This article had been prepared over a substantial period of time and the selection of the material to be placed in the article was done with direction and pre-meditation by the officials of the newspaper. The article itself was not an attempt to dispassionately report on a legal proceeding in Washington County, Rather, it sought the more sensational angle of the family's turmoil and, to further enhance reader interest, injected the notion that a respected and responsible lawyer acted with gross impropriety in conduct striking at the very heart of his personal and professional reputation. The *Post-Gazette* did not seek the fair and accurate reporting of these events; it sought melodrama. A. 115-16a.

The Superior Court of Pennsylvania, in affirming the verdicts, responded similarly:

> Rather, in light of all that has been discussed, it is apparent that the jury was reacting to the grossly cavalier attitude towards the sensitivities and reputation of a prominent member of the community by a major publishing force in the region. A. 71a
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> * * *
>
> Actual malice, though not without its detractors, has served its purpose by according protection only to those who do not publish with knowledge of or intentional blindness to the truth, and therefore whose actions serve the objectives of robust debate. All others, who act in disregard for the truth and therefore contribute nothing, are properly forced to take their chances in the same free marketplace of ideas which they have sought to abuse. The facts of this case do not recommend to us the need to lessen the risks taken by the latter category of defendants. A.73a

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REASONS FOR REFUSAL OF THE WRIT

Even Petitioner's formulation of the neutral reportage doctrine requires that a publisher must be both accurate

and disinterested. As abundantly proved at trial and as the trial judge noted, Petitioner's accusations against Richard DiSalle were neither accurate nor disinterested. On the contrary, Petitioner, in rewriting the first draft of its own reporter's story, distorted the facts so as to target Judge DiSalle, and, in so doing, both espoused and concurred in the charges made against him. Therefore, even if neutral reportage were a constitutional doctrine, it would have no applicability to the facts of the present case, either under Petitioner's formulation or under the formulation of any court or commentator.

The punitive damage award, appropriately based upon Petitioner's actual malice and its common law malice (outrageous conduct)[13] and upheld by the Pennsylvania courts as not being excessive, is not subject to constitutional attack because Petitioner's present due process argument was never raised before those Pennsylvania courts which considered the merits of Petitioner's appeal from the jury verdicts. As a result, Petitioner never gave the Pennsylvania courts an opportunity to consider whether the Eighth or Fourteenth Amendments imposed any restriction on the amount of the punitive damage verdict.

A. NEUTRAL REPORTAGE IS NOT APPLICABLE TO THE FACTS OF THIS CASE.

Although not contending that there was insufficient evidence for the jury to have found that Petitioner acted

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[13] Contrary to what Petitioner now states (Petition, p. 6), it was Petitioner itself that specifically asked the trial judge to charge that "punitive damages may be awarded for conduct that is outrageous because of the defendant's evil motive or [its] reckless indifference." Petitioner's Supplemental Proposed Point for Charge No. 65.

with actual malice in the publication of its article about Richard DiSalle, Petitioner claims that it is entitled to an additional protection, beyond actual malice, by virtue of the neutral reportage doctrine. However, in presenting its question to this Court (Question Presented A, p. i). Petitioner acknowledges that neutral reportage requires that the publisher make an "accurate and disinterested report of statements about alleged misconduct by a public official."[14] As the record clearly shows, Petitioner's statements about DiSalle were not only inaccurate, they were far from disinterested. In fact, Petitioner has conceded that there was sufficient evidence for the jury to have concluded that, in reporting on the will contest proceeding, Petitioner abused the common law fair comment privilege by being both unfair and inaccurate.[15]

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[14] None of the cases cited by Petitioner in which neutral reportage has been discussed has involved the report of a judicial proceeding. Publishers have always been protected in reporting upon court cases by the common law fair comment privilege, and, since 1964, by the actual malice doctrine. Neutral reportage was formulated by some courts and commentators to cover situations where statements have been made about newsworthy events which have not involved court proceedings. Respondents suggest that, in the cases cited by Petitioner, the actual malice rule was sufficient protection. See, e.g., *Edwards v. National Audubon Society, Inc.*, 566 F.2d 113, 120, *cert. denied* 434 U.S. 1002 (1977) ("Even absent the special protection afforded to neutral reportage . . . the evidence adduced at trial was manifestly insufficient to demonstrate 'actual malice' on the part of the *Times*.")

[15] In appealing from the verdicts, Petitioner did not claim that its article was an accurate and disinterested report of the Ciaffoni will contest proceeding. Rather, Petitioner specifically told the Pennsylvania Superior Court that the "article constituted a rational interpretation of the allegations and assertions of the *contestants* of the will" (Brief in the Superior Court, p. 11 (emphasis added)); and told the Pennsylvania Supreme Court that

(Continued on following page)

Petitioner's inaccuracy and its espousal of Robert Ciaffoni's false accusations, were demonstrated at trial in many ways: Petitioner identified pages of the will as being "doctored" even though Ciaffoni himself did not use this word; Petitioner deleted from the article the statement that document examiners chosen by the contestants had concluded that the will was authentic; Petitioner selected the quotation about the alleged meretricious relationship from a deposition transcript in which Ciaffoni stated in answers to other questions that "I didn't find nothing" and "I don't say that, I don't know that", and in which his lawyer stated "we don't purport to prove" any such allegation; and Petitioner edited the first draft so as to target DiSalle, turning the article into what was known by Petitioner's own staff as "the DiSalle story." Therefore, even leaving aside Petitioner's other knowledge (including knowing that Robert Ciaffoni had been identified as a liar and had lied to Petitioner's own reporter), by crafting the story as it did Petitioner both espoused and concurred in the charges made by Ciaffoni and, in addition, deliberately distorted the statements which Ciaffoni made to launch a personal attack of its own on a public official. *Edwards v. National Audubon Society,* 556 F.2d 113, 120 (2d Cir.), *cert. denied* 434 U.S. 1002 (1977); *Goldwater v. Ginzburg,* 414 F.2d

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(Continued from previous page)
the "article captured the essence of the *contestants'* claims" (Petition for Allowance of Appeal to the Pennsylvania Supreme Court, p. 9 (emphasis added)). In other words, Petitioner's interpretation of neutral reportage was that it could write a story about a small portion of an entire proceeding or event, and this would be constitutionally protected. Petitioner has particularly applied this argument to the sexual intimacy quotation which it extracted, out of context, from Robert Ciaffoni's deposition, ignoring the contrary statements of both Ciaffoni and his lawyer, in the same deposition, which were exculpatory as to DiSalle.

324, 337 (2d Cir. 1969); *Cianci v. New Time Publishing Co.*, 639 F.2d 54, 68-70 (2d Cir. 1980).

As Petitioner has admitted, courts and commentators have disagreed on what neutral reportage means and whether there is any formulation which should have a constitutional basis.[16] But it is clear that the facts presented at trial, facts which Petitioner does not dispute, demonstrate that Petitioner's attack on Richard DiSalle was far from neutral and created a sting more painful than Robert Ciaffoni's own accusations.

B. PETITIONER HAS WAIVED ANY CONSTITUTIONAL OBJECTION TO THE PUNITIVE DAMAGE AWARD.

In presenting its question to this Court concerning the punitive damage award (Question Presented C, p.i), Petitioner has raised the contention that it was deprived of due process of law because the amount of punitive damages awarded to a public official was ten times the amount of the compensatory award, citing *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, No. 88-556, *cert. granted* December 5, 1988, 57 U.S.L.W. 3390, a case involving the excessive fines clause of the Eighth Amendment. However, Petitioner has not identified for this Court where in the record of this case, at trial or on appeal, it raised any Eighth or Fourteenth Amendment objections to the punitive damage award.[17]

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[16] In its opinion, the Pennsylvania Superior Court theorized that neutral reportage, might, in the proper case, have merit, but it made no holding in this regard and its comments were dicta. A.21-41a.

[17] At no point has Petitioner complied with Supreme Court Rule 21.1(h).

(Continued on following page)

In fact, Petitioner raised no due process or excessive fines objections in its post-trial motions or in its briefs to the trial court or the Pennsylvania Superior Court. As noted previously, at trial Petitioner not only did not raise the issue of proportionality between the punitive and compensatory awards but made no objection to the court's charge that proportionality was not required. In addition, Petitioner specifically asked the trial judge to instruct the jury that the amount of the punitive damage award was solely in the jury's discretion. And after the verdicts were rendered, Petitioner failed to raise any proportionality argument in its motions for post-trial relief. Petitioner's principal contention was that the punitive damage award was excessive under Pennsylvania common law, an argument that the Pennsylvania courts rejected after reviewing the entire trial record. A. 66-71a; 111-16a.

As a result of Petitioner's failure to raise constitutional issues, the Pennsylvania courts had no opportunity to pass on the applicability of the due process or excessive fines provisions of the United States Constitution. Petitioner has clearly waived the only argument which it now makes against the award of punitive damages. *See, e.g., Bankers Life and Casualty Co. v. Crenshaw,* 486 U.S. —, 108 S.Ct. 1645 (1988).

(Continued from previous page)

Petitioner states that the Superior Court "divided" on the constitutionality of punitive damages (Petition, p. 9). This is misleading. The dissenting judge did not contend that punitive damages were unconstitutional. His objection, raised *sua sponte,* was that due process required that the evidence of punitive damages be bifurcated from the evidence of compensatory damages. A. 82-83a. This contention was not raised by Petitioner at any stage of this litigation and is not raised in the present petition.

Although Petitioner does not raise a First Amendment issue in the questions it has presented to this Court for review, it should be noted that the Superior Court analyzed the punitive damage issue in light of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).[18] The Court properly held that *Gertz* did not prohibit punitive damage awards, only that such damages required proof of actual malice.[19] As previously stated, Petitioner does not dispute the sufficiency of the evidence which permitted the jury to conclude that, in publishing its article, Petitioner had acted with both actual malice and common law malice.

———o———

[18] At trial, Petitioner did not claim that *Gertz* was an absolute bar to punitive damages, only asking that the judge charge the jury that "imposing punitive damages in an improper case, or imposing excessive damages upon the Defendant in a proper case, would pose a threat to the legitimate interests of freedom of speech and of the press which are protected by our Federal Constitution." Petitioner's Supplemental Proposed Point for Charge No. 71.

[19] On remand, Gertz received an award of both compensatory and punitive damages. *Gertz v. Robert Welch, Inc.*, 680 F.2d 527 (7th Cir. 1982), *cert. denied* 459 U.S. 1226 (1983).

CONCLUSION

For the foregoing reasons, it is submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted

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APPENDIX

IN THE COURT OF COMMON PLEAS OF
WASHINGTON COUNTY, PENNSYLVANIA

CIVIL ACTION — LAW

RICHARD DiSALLE and JOAN DiSALLE, his wife,	)	
Plaintiffs	)	
vs.	)	NO. 367
	)	Sept. Term 1979
PG PUBLISHING COMPANY, trading as the PITTSBURGH POST-GAZETTE, a corporation,	)	
Defendant	)	

COMPLAINT IN TRESPASS
FIRST COUNT

RICHARD DiSALLE, Plaintiff, vs. PG PUBLISHING COMPANY, trading as the PITTSBURGH POST-GAZETTE, a corporation, Defendant.

1. RICHARD DiSALLE, Plaintiff herein, is a resident of Washington County, Pennsylvania.

2. JOAN DiSALLE, the other Plaintiff herein, is a resident of Washington County, Pennsylvania, and is the wife of Plaintiff, Richard DiSalle.

3. PG PUBLISHING COMPANY, trading as the PITTSBURGH POST-GAZETTE, Defendant herein, is a corporation chartered and existing under the laws of the Commonwealth of Pennsylvania, with a principle place of business in the City of Pittsburgh.

4. At all times relevant to the matters set forth in this Complaint, Defendant owned and published a certain

daily newspaper of general circulation known as the "Pittsburgh Post-Gazette," said newspaper being published and circulated in Washington County and in other counties of Western Pennsylvania, and also being published and circulated in other areas of Pennsylvania and in other places in the United States and throughout the world.

5. On September 10, 1979, the daily edition of the Pittsburgh Post-Gazette was published and was circulated to readers in Washington County and in the other areas of the Post-Gazette's circulation as described in the preceeding paragraph.

6. On page 2 of the Post-Gazette's edition of September 10, 1979 there appeared an article headlined "FEUD HEATS IN FAMILY'S BATTLE FOR $8 MILLION INHERITANCE." A copy of said article is attached hereto, incorporated herein and marked Exhibit "A" and may hereafter be designated as the "Article."

7. The said Article purported to describe the legal contest involving the estate of Paul Ciaffoni, deceased, and in the Article Defendant referred to various sources for its information, including Robert Ciaffoni, a son of the decedent and one of the contestants of decedent's 1968 will.

8. A fair reading of the said Article by recipients of the Article discloses that Defendant published the following statements with reference to Plaintiff, Richard DiSalle:

(a) That in 1968 and thereafter Plaintiff was a lawyer;

(b) That in 1968, in his capacity as a lawyer, Plaintiff allegedly drafted a will for Paul Ciaffoni, a Washington County millionaire who died in 1974;

(c) That the will, by reason of the fraud of Plaintiff, Richard DiSalle, acting either alone or in conspiracy with others, was falsified so as to benefit one of Paul Ciaffoni's children, to-wit, Elizabeth Cowden, to the detriment of other members of the family;

(d) That pages of the will, before and after the page leaving the said Elizabeth Cowden her legacy, were "doctored" so as to permit the insertion of the legacy to her;

(e) That the second page of the will was "controversial" and that an examination of the will by an inspector for the United States Postal Service concluded that the said page was "inconsistent" with the other pages of the will;

(f) That the falsification of the will was demonstrated by the fact that two pages of the will ended with a period at the conclusion of a complete sentence, whereas Plaintiff, in order to prevent alterations of a will, had never allowed other wills which he drafted to have pages ending in such a manner;

(g) That the fraud and falsification in which Plaintiff participated was based in part upon an illicit and/or improper relationship between Plaintiff and the said Elizabeth Cowden;

(h) That, when questioned by one of Defendant's reporters during an interview with reference to the two pages of the will ending with a period, Plaintiff refused to comment;

(i) That in a will contest proceeding in the Court of Common Pleas of Washington County, Judge Keim, presiding over the trial, "ruled as inadmissible claims by experts hired by the contestants that portions of the will were altered";

(j) That in the will contest proceeding Judge Keim upheld the authenticity of the will but as of the date of the Article, to-wit, September 10, 1979, Judge Keim had reserved the right to change his decision pending the filing of briefs for each side;

(k) That in the 1968 will, one of Paul Ciaffoni's daughters, Margaret Soverio, received nothing but under a prior will of 1965 had received 500 acres of land in North Fayette Township;

(l) That the 1965 will was the one which the proponents in the will contest proceeding claim is their father's real will.

9. The statements contained in Defendant's Article, as set forth in subsections (c) through (l) of paragraph 8 above, were substantially false and untrue in the following particulars, inter alia:

(a) Plaintiff, Richard DiSalle, a lawyer, at the request of Paul Ciaffoni, drafted a will in 1968;

(b) Contrary to Defendant's statements as to fraud and falsification, the will was typed by the secretary in Plaintiff's law office and, following the typing of the will, was executed by Paul Ciaffoni and was properly witnessed by three disinterested witnesses (none of whom was to receive anything under the will). The will as executed and

witnessed was immediately delivered to the possession of Paul Ciaffoni, Plaintiff retaining two carbon copies of the typewritten will;

(c) Also contrary to Defendant's statements as to fraud and falsification, the provisions of the will were provisions specifically requested by Paul Ciaffoni and were incorporated into the will as typewritten at his request;

(d) Contrary to Defendant's statement as to the exclusion of Margaret Soviero, a daughter, from Paul Ciaffoni's 1968 will as opposed to the bequest to her in the 1965 will, Margaret Soviero was excluded at Paul Ciaffoni's specific direction. The bequest in the 1965 will was only for a life estate in the farm surface of 500 acres of ground in North Fayette Township and not a bequest of a fee interest in the 500 acres;

(e) Contrary to Defendant's statement as to Plaintiff's relationship with Elizabeth Cowden, neither at the time that the 1968 will was drafted nor at any other time did Plaintiff have any improper or illicit relationship with Elizabeth Cowden. In fact, in the will contest trial before Judge Keim in the Court of Common Pleas of Washington County, the contestants of the 1968 will made no offer to prove that any improper or illicit relationship existed between Plaintiff and Elizabeth Cowden at any time. Moreover, while Plaintiff was on the witness stand for two days in said proceeding, no questions were even asked of him by the attorney for contestants as to any relationship between him and Elizabeth Cowden;

(f) Also contrary to Defendant's statements as to fraud and falsification, following Paul Ciaffoni's execution

of the will and its immediate delivery to Paul Ciaffoni's custody, Plaintiff never again saw the will nor heard anything further about the will until after the will was probated;

(g) Also contrary to Defendant's statements about fraud and falsification, Plaintiff at no time participated in any changes, insertions or alterations in or to the will following its execution and, in fact, the will as probated is in the same form as it was when executed by Paul Ciaffoni in 1968. Moreover, during the will contest trial before Judge Keim, the contestants offered no evidence tending to show that Plaintiff changed or altered the will in any way.

(h) Contrary to Defendant's statement about the findings of the inspector of the United States Postal Service who examined the will, the inspector in fact concluded that there was no "significant evidence that would tend to challenge the collective authenticity" of the pages of the original 1968 will and the two typed copies. At the will contest trial in the Court of Common Pleas of Washington County, the contestants made no offer whatsoever to call the United States Postal Service inspector as a witness nor did they even make any offer to have his report admitted into evidence. The report of the inspector merely pointed to the fact that page 2 of the will, which page contained no dispositive provisions with reference to Elizabeth Cowden and therefore was not a "controversial" page, was typed on a paper of different manufacture than the other pages of the will;

(i) Also contrary to Defendant's statements as to fraud and falsification, the persons contesting the 1968 will of Paul Ciaffoni retained Ordway Hilton, a world re-

nowned document examiner, to examine the 1968 will, and the said Ordway Hilton prepared an extensive report, in which report he concluded that the will was not altered or falsified in any way and that the carbon copies of the will retained by Plaintiff were, in fact, actual carbon copies of the original will signed by Paul Ciaffoni and probated following his death. Following the submission of his report, the contestants fired Hilton and he thereafter was appointed as the court's expert by Judge Simmons of the Court of Common Pleas of Washington County and his report then became a part of the court papers in the will contest proceeding in the Court of Common Pleas of Washington County;

(j) Contrary to Defendant's statement as to Judge Keim's rulings on the admissibility of claims by contestants' experts during the will contest trial, not only did Judge Keim not rule as inadmissible claims by experts hired by the contestants that portions of the will were altered but at said trial the contestants did not even offer any evidence whatsoever tending to show any such alterations, making a ruling by Judge Keim unnecessary;

(k) Contrary to Defendant's statement as to Plaintiff's practice of not ending pages of wills with a period, Plaintiff in his law practice had no such rule or practice;

(l) Contrary to Defendant's statement that pages of the will were "doctored," at the will contest trial in the Court of Common Pleas of Washington County, no evidence was offered by the contestants tending to show that any portion of the will was "doctored" nor, in fact, does any such evidence exist;

(m) Contrary to Defendant's statement as to the status of Judge Keim's decision, although Judge Keim could have changed his decision in considering the exceptions filed by the contestants to his dismissal of the will contest, Judge Keim, in fact, on August 27, 1979, filed an opinion dismissing the exceptions and upholding the 1968 will. This decision was therefore filed approximately two weeks prior to Defendant's Article appearing in Defendant's paper;

(n) Contrary to Defendant's statement that the proponents of the will contended that the 1965 will was Paul Ciaffoni's real will, the 1965 will was not the one which the proponents claimed was the real will of Paul Ciaffoni. Rather the proponents claimed and continue to claim that the 1968 will is his real will;

(o) Contrary to Defendant's statement that Plaintiff refused to comment to Defendant, at no time was Plaintiff, Richard DiSalle, questioned or attempted to be questioned, or interviewed or attempted to be interviewed, by Thomas J. Porter, Jr. who wrote Defendant's September 10, 1979 Article. However, in April, 1979, Plaintiff was interviewed by another reporter of Defendant, David Leherr, in connection with another matter. During that interview the said David Leherr questioned Plaintiff about the Ciaffoni case and not only did Plaintiff not refuse to comment but Plaintiff answered each and every question put to him by Leherr about matters involving the Ciaffoni estate and told the said reporter, inter alia:

(1) That in a document filed in the will contest proceeding Judge Paul A. Simmons (who at the time was presiding judge of the Orphans Court Division of the Court of Common Pleas of Washington County, and who is now a

judge of the United States District Court for the Western District of Pennsylvania) had stated that Robert Ciaffoni had at first refused to act as co-executor of the estate of his father, Paul Ciaffoni, because he claimed that the 1968 will was fraudulent; that he later petitioned the court to allow him to act as co-executor and was permitted to do so on his representation to the court that he would never at any time in the future contest the will or claim that it was fraudulent; and that despite his representations Robert Ciaffoni did not keep his word to the court even though made under oath. Judge Simmons further stated that Robert Ciaffoni had lied to the court and the court had referred to Robert Ciaffoni as a liar. Plaintiff further told Leherr that following these statements by Judge Simmons, the contestants filed a petition in the Supreme Court of Pennsylvania to have Judge Simmons disqualified from hearing the case and the Supreme Court of Pennsylvania denied the petition;

(2) That the contestants had originally hired Ordway Hilton, a world renowned documents examiner, to examine the 1968 will and, when he advised the contestants that the will had not been tampered with or altered in any way, they fired him and that, thereupon, Judge Simmons appointed Ordway Hilton as the court's expert witness;

(3) That Ordway Hilton's report was on file with the court papers in Washington County;

(4) That the inspector of the United States Postal Service had concluded that there was no significant evidence that would tend to challenge the collective authenticity of the will;

(5) That, at the will contest trial in Washington County before Judge Keim, there was no offer of proof made by the contestants that any portion of the will had been altered or that there was any substitution of pages;

(6) That there was absolutely no truth to any allegation of an improper relationship between Plaintiff and Elizabeth Cowden and, in fact, no reference had been made to it at the will contest trial and Plaintiff, during two days on the witness stand, was asked absolutely no questions by contestants' attorney, directly or indirectly about the existence of any such relationship;

(7) That the deposition testimony of Robert Ciaffoni had not been admitted into evidence at the will contest trial;

(8) That the report of the inspector of the United States Postal Service had not been admitted into evidence at the will contest trial and no such offer had even been made;

(9) That if the Post-Gazette planned to do an article, they should come to Washington County and investigate the entire matter, including an examination of the court papers and documents and including determining the reputation of Robert Ciaffoni for truth and veracity; and

(10) That the attorney for the contestants had stated in a hearing before Judge Simmons on May 4, 1977, that Plaintiff's integrity was not being questioned.

10. Plaintiff's conduct as described in Defendant's Article would, if true, have subjected Plaintiff to prosecution for violation of various provisions of the Pennsyl-

vania criminal laws including obstruction of justice, falsification of records, and forgery. Defendant's Article, therefore, published statements accusing Plaintiff of having violated the criminal laws of the Commonwealth of Pennsylvania.

11. Plaintiff's conduct as described in Defendant's Article would, if true, have subjected Plaintiff to disciplinary action, including disbarment, for violation of the Code of Professional Responsibility applicable to lawyers in the Commonwealth of Pennsylvania by virtue of rules adopted by the Supreme Court of Pennsylvania. Defendant's Article, therefore, published statements accusing Plaintiff, as a lawyer, of having acted unethically.

12. At the time of the interview of Plaintiff by Defendant's reporter, David Leherr, as described in subsection (o) of paragraph 8 aforesaid, the said Leherr told Plaintiff that all of the information obtained by Leherr would be turned over to those employees of Defendant who were working on the story concerning the estate of Paul Ciaffoni, deceased, and the said Leherr assured Plaintiff that said matters would be fully investigated before any article on the case would be published.

13. Notwithstanding the statements and assurances made by Defendant's reporter, David Leherr, as described in paragraph 12 aforesaid, Defendant failed to investigate fully the matters involving the estate of Paul Ciaffoni, deceased, and, in particular, failed to investigate the pertinent portions of the court record in the will contest proceeding in the Court of Common Pleas of Washington County. As a result, Defendant's Article of September 10, 1979 was published and circulated by Defendant.

14. At all times relevant to the matters set forth herein, Thomas J. Porter, Jr., David Leherr, and all other persons having anything to do with the writing and publication of the Article of September 10, 1979, were the agents, servants and employees of Defendant and were acting in and upon Defendant's business, while in the course of their employment by Defendant, and while acting within the scope of their authority from Defendant.

15. Defendant's conduct in publishing and circulating the Article failed to meet the legal standards of accuracy and fairness in that it was edited and written so as to misrepresent the facts in general and the court proceedings in particular. Material appearing in the Article was so arranged and placed as to convey erroneous and misleading impressions to those reading the Article. Moreover, the Article was based substantially and significantly, if not in its entirety, on the statements, comments, observations and innuendos of Robert Ciaffoni, one of the litigants to the proceedings, without proper examination of and/or reporting upon impartial and disinterested sources such as the report of Ordway Hilton, the report of the inspector of the United States Postal Service, the actual evidence presented in the will contest trial, and the decisions and opinions of Judge Simmons and Judge Keim. In addition, Defendant failed to investigate and report upon Robert Ciaffoni's truth and veracity or lack of it as demonstrated by the court proceedings and his general reputation in the community. By reason of the foregoing, the Article as published and circulated collectively consisted of falsehoods, innuendos and misrepresentations, particularly with reference to Plaintiff, and constituted an extreme departure

from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

16. At the time that Defendant published the Article, Defendant knew that the statements contained in the Article, as delineated in paragraph 8, subsections (c) through (l), aforesaid, were false and untrue.

17. In the alternative, Defendant published the said Article and the statements contained therein, with reckless disregard for the truth.

18. Defendant's conduct in publishing and circulating the Article was wilful, reckless, intentional and malicious and was published with intent to cause harm to Plaintiff.

19. As a result of the publication and circulation of the Article, Plaintiff, Richard DiSalle, has suffered the following injuries and damages:

(a) His good name and reputation have been defamed;

(b) He has been held up to odium, scorn and contempt;

(c) He has suffered embarrassment and humiliation;

(d) He has suffered emotional shock and trauma;

(e) His ability to earn a living has been impaired.

Some or all of the foregoing injuries and damages may continue into the future and some may be permanent.

20. By reason of Defendant's conduct, Defendant is liable to Plaintiff, Richard DiSalle, for general, special and compensatory damages.

21. By reason of Defendant's wilful, reckless, intentional and malicious conduct, Defendant is liable to Plaintiff, Richard DiSalle, for punitive damages in the sum of $6,500,000.

WHEREFORE, Plaintiff, Richard DiSalle, claims general, special and compensatory damages from Defendant in a sum in excess of $10,000 and claims punitive damages against Defendant in the sum of $6,500,000. Jury trial is demanded.

SECOND COUNT

JOAN DiSALLE, Plaintiff, vs. PG PUBLISHING COMPANY, trading as the PITTSBURGH POST-GAZETTE, a corporation, Defendant.

22. Plaintiff incorporates by reference and makes a part of this Count all of the paragraphs of the First Count of this Complaint.

23. By reason of the conduct of Defendant and its effect upon Plaintiff, Richard DiSalle, Plaintiff Joan DiSalle, his wife, may suffer the loss of the consortium, services, society, companionship, comfort and support of her husband.

WHEREFORE, Plaintiff, Joan DiSalle, claims general, special and compensatory damages against Defendant in a sum in excess of $10,000 and claims punitive damages against Defendant in the sum of $250,000. Jury trial is demanded.

THIRD COUNT

RICHARD DiSALLE, Plaintiff, vs. PG PUBLISHING COMPANY, trading as the PITTSBURGH POST-GAZETTE, a corporation, Defendant.

24. Plaintiff incorporates by reference and makes a part of this Count all of the paragraphs of the First Count of this Complaint.

25. The conduct of Defendant in publishing and circulating the Article was extreme and outrageous, and intentionally or recklessly caused Plaintiff, Richard DiSalle, to suffer severe emotional distress.

26. By reason of the foregoing, Defendant is liable to Plaintiff, Richard DiSalle, for the severe emotional distress suffered by him.

WHEREFORE, Plaintiff claims general, special and compensatory damages against Defendant in a sum in excess of $10,000 and claims punitive damages against Defendant in the sum of $1,500,000. Jury trial is demanded.

FOURTH COUNT

JOAN DiSALLE, Plaintiff, vs. PG PUBLISHING COMPANY, trading as the PITTSBURGH POST-GAZETTE, a corporation, Defendant.

27. Plaintiff incorporates by reference and makes a part of this Count all of the paragraphs in the First Count of this Complaint.

28. The conduct of Defendant in publishing and circulating the Article was extreme and outrageous and intentionally or recklessly caused Plaintiff, Joan DiSalle, to suffer severe emotional distress.

29. By reason of the foregoing, Defendant is liable to Plaintiff, Joan DiSalle, for the severe emotional distress suffered by her.

WHEREFORE, Plaintiff claims general, special and compensatory damages against Defendant in a sum in excess of $10,000 and claims punitive damages against Defendant in the sum of $500,000. Jury trial is demanded.

BERGER, KAPETAN, MALAKOFF
& MEYERS

/s/ By Daniel M. Berger
Attorneys for Plaintiffs

IN THE COURT OF COMMON PLEAS OF
WASHINGTON COUNTY, PENNSYLVANIA
CIVIL DIVISION-LAW

RICHARD DiSALLE and JOAN DiSALLE, his wife, Plaintiffs,	)	No. 367
vs.	)	September Term,
PG PUBLISHING COMPANY, trading as the PITTSBURGH POST-GAZETTE, a corporation, Defendant.	)	1971 A.D.

ANSWER AND NEW MATTER

Defendant PG Publishing Company, by its attorneys, EGLER & REINSTADTLER, hereby filed the following Answer and New Matter:

ANSWER

Defendant is advised that no response to the allegations of plaintiffs' Complaint in Trespass is required but that pursuant to Rule 1045, Pennsylvania Rules of Civil Procedure, all of said allegations are deemed denied and strict proof thereof is required at the time of trial.

NEW MATTER

1. The newspaper article which contains the allegedly libelous statements described in plaintiffs' Complaint is a fair and accurate report of judicial proceedings.

2. The newspaper article described in plaintiffs' Complaint was published without actual knowledge of any falsity contained therein and without serious doubt as to the truth of the statements contained therein.

3. The newspaper article described in plaintiffs' Complaint was published in order to inform the public concerning the judicial proceedings described therein and not solely for the purpose of causing harm to the plaintiff.

4. The publication of the allegedly libelous statements is priviledged under applicable Pennsylvania law.

5. At the time of the allegedly libelous publication, the plaintiff was a Judge of the Commonwealth of Pennsylvania and as such was both a public official and a public figure.

6. The publication of the allegedly libelous statements is protected by the First Amendment of the United States Constitution.

7. The allegedly libelous material involves exclusively statements summarizing the contentions of parties to a judicial proceeding which statements are true and accurate.

8. The plaintiff has sustained no special damages as a result of the allegedly libelous publication.

9. Plaintiff has not been disbarred.

10. Plaintiff has not been subjected to criminal prosecution.

11. Plaintiff has not been subjected to any disciplinary proceeding nor has the plaintiff been sanctioned for violation of the Code of Professional Responsibility.

EGLER & REINSTADTLER
BY: /s/ Avrum Levicoff
ATTORNEYS FOR PG
PUBLISHING COMPANY

Supreme Court, U.S.
FILED
MAY 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1638

IN THE

Supreme Court of the United States

October Term, 1988

PG PUBLISHING COMPANY, t/a THE PITTSBURGH POST-GAZETTE, a corporation,
Petitioner,

vs.

RICHARD DISALLE and JOAN DISALLE, his wife,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA.

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IN THE

Supreme Court of the United States

October Term, 1988

No. 88-1638

PG PUBLISHING COMPANY, t/a THE PITTSBURGH POST-GAZETTE, a corporation,
Petitioner,

vs.

RICHARD DISALLE and JOAN DISALLE, his wife,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

REPLY BRIEF OF PETITIONER

Stripped of hyperbole, respondents' Brief in Opposition presents few points even worthy of response. To the extent that respondents' legal position is discernible at all, it would appear to be that the Post-Gazette failed to preserve the issues it now raises before this Court.

The simplest answer to this assertion is found in the appellate opinion below. The Superior Court clearly deemed it necessary to confront and decide all of the issues presented in this Petition. Nor was that court reticent about dismissing arguments that it felt had been waived. *See* A. 65a-66a. Surely, had the Post-Gazette failed to adequately preserve its positions below, the Superior Court's opinion could have been considerably shorter and would have generated no dissent at all.

Three specific points of rebuttal, however, are merited.

1. The common law privilege to report on judicial proceedings is not co-extensive with the privilege of neutral reportage.

As the Post-Gazette pointed out in its original Petition (p. 6, n. 2), the jury was instructed on a common law privilege that the trial court labelled as "fair comment." That instruction, the full text of which is set forth at A. 104a-105a, was intended to protect the Post-Gazette from liability for reporting on a "judicial proceeding" so long as the report was a "fair abridgement" of that proceeding.

As respondents concede, however, the Post-Gazette also requested an additional instruction that would have protected an "accurate and disinterested" report of "serious charges" made against Richard DiSalle (a public figure) by the will contestants. This instruction, which described the privilege of "neutral reportage," was refused.

There are significant distinctions between these two privileges, distinctions all the more important given the facts of this case. Respondents have repeatedly stressed, for example, that the portion of Robert Ciaffoni's deposition excerpted in the article "had never been used or referred to at the trial." Brief in Opposition, p. 2. *See also id.,* at 3. Surely a rational jury could have found that the Post-Gazette's quotation of that deposition was privileged as neutral reportage, even though it played no role in the judicial proceeding itself and therefore might not qualify for the common law privilege.

Similarly, while the common law privilege requires a newspaper to publish a "fair abridgement" of the entire proceedings, the privilege of neutral reportage requires only an accurate and disinterested rendition of the fact that certain serious charges have been made against a public official by an identified accuser. Again, a rational jury could have concluded that the Post-Gazette accurately reported Robert Ciaffoni's accusations even though it might not have presented an abridgement of the judicial proceedings themselves. As the trial court itself noted, it was not the Post-Gazette's purpose to "synthesize the proceedings in Washington County." A. 110a. Unfortunately, the trial court failed to recognize that such a synthesis was not the only format in which Robert Ciaffoni's charges might permissibly be reported.

In sum, the Post-Gazette requested, and was entitled to receive, instructions on both the common law privilege of "fair comment" and the constitutional privilege of neutral reportage. Given the facts of this case, no one can say, as a matter of law, that the failure to give the latter instruction did not affect the outcome.

2. There has been no finding that the Post-Gazette did not make an "accurate and disinterested" report of Robert Ciaffoni's charges.

In asserting that the Post-Gazette's article was neither accurate nor disinterested, and therefore could not qualify as neutral reportage as a matter of law, respondents confuse the issue of truth with the issue of accurate reporting. They consistently characterize the relevant portions of the article as "Petitioner's accusations" and "Petitioner's statements about DiSalle[.]" Brief in Opposition, pp. 10-11.

The important issue, of course, is not whether Mr. Ciaffoni's accusations were true or false, but rather whether the Post-Gazette reported those accusations in an accurate and disinterested fashion. In this regard, it should suffice to note that the Post-Gazette quoted the actual exchange between DiSalle's own attorney and Robert Ciaffoni, complete with its nuances and qualifications:

> [Q.] Now you tell me what has been told to you by other people which to you is an indication of sexual intimacy between Richard DiSalle and Elizabeth Cowden?
>
> [* * *]
>
> [A.] I'm sorry, your [*sic*] misstating my position. I said they were by themselves for extended periods of time and were observed by other people and that it could develop into that. That's all I am telling you.

A. 78a. In any event, while the trial court did suggest that the article "was not an attempt to dispassionately report on a legal proceeding in Washington County," A. 115a-116a, no court has concluded, or could conclude,

that the Post-Gazette did not, as a matter of law, report Robert Ciaffoni's charges in an accurate and disinterested manner.

Here again, it is important to note that the Superior Court, in deciding this case, did not hold that the privilege of neutral reportage was forfeited because the article did not report the accusations in an accurate and disinterested manner. Instead it concluded that the privilege was unavailable because Mr. Ciaffoni, the accuser, was not "a public figure already embroiled in a public controversy . . . ." A. 40a. As pointed out in the original Petition, no other court has restricted the privilege of neutral reportage in this fashion.

3. The Post-Gazette adequately preserved its constitutional challenge to the award of punitive damages.

In the trial court, the Post-Gazette specifically asked that the jury be instructed that, "in arriving at an award of damages, you must be careful not to go beyond fair compensation for the actual injury caused to the plaintiffs, since to do so would pose a threat to the legitimate interest of freedom of speech and of the press which are protected by the Constitution." A. 62a, n. 25. It also asked for an instruction that "imposing punitive damages in an improper case, or imposing excessive damages upon a defendant in a proper case, would pose a threat to the legitimate interests of freedom of speech and of the press which are protected by our Federal Constitution." A. 63a, n. 25. In both cases, the Post-Gazette cited as its authority *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). In both cases, the requested instruction was denied.

If further evidence of the preservation of this issue were needed, it is found in the lengthy treatment of the constitutional implications of punitive damages in the majority opinion of the Superior Court. *See* A. 43a-59a. As noted earlier, the Superior Court had no problem dismissing arguments it deemed to be waived. Judge Montgomery's dissent, moreover, was directed, in large part, to this precise point.[1]

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[1] Respondents suggest that Judge Montgomery raised this issue "*sua sponte.*" Brief in Opposition, p. 13, n. 17. There is simply no basis for this statement.

Finally, respondents suggest that the Post-Gazette failed, in the court below, to cite "the due process or excessive fines provisions of the United States Constitution" on the issue of punitive damages. Brief in Opposition, p. 14. This argument fails to recognize, however, that citation to the first amendment necessarily entailed, in this case, the notion of due process. Absent the due process clause of the fourteenth amendment, neither the first amendment nor the eighth amendment would have *any* applicability to state court proceedings. *See Near v. Minnesota*, 283 U.S. 697, 707 (1931); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947). As the Post-Gazette noted in its original Petition to this Court, the protections of the first, eighth and fourteenth amendments are merged, in this context, "into a single constitutional concept." Petition, p. 21.

Conclusion

The Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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